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Supreme Court of the United States

OCTOBER TERM, 1967

No. 47

SAM GINSBERG, APPELLANT,

vs.

NEW YORK

APPEAL FROM THE APPELLATE TERM OF THE SUPREME COURT OF NEW YORK, SECOND JUDICIAL DEPARTMENT

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INDEX

	Original	Print
Record from the Appellate Term of the Supreme Court of the State of New York, Second Judicial Department		
Statement under Rule 5531	A	1
Proceedings in the District Court of Nassau County, State of New York, First District	B	2
Information dated October 27, 1965	B	2
Information dated October 28, 1965	D	4
Warrant	F	6
Transcript of trial, April 18, 1966	1	8
Appearances	1	9
Motions, rulings and colloquy thereon	2	9
Testimony of Richard Lance Corey—		
direct	20	20
cross	49	38
Voir dire	83(a)	60
redirect	89	63
recross	99	70

RECORD PRESS, PRINTERS, NEW YORK, N. Y., AUGUST 25, 1967

	Original	Print
Proceedings in the District Court of Nassau County, State of New York, First District—Continued		
Transcript of trial, April 18, 1966—Continued		
Testimony of Mrs. Mary Corey—		
direct	101	71
cross	112	78
Det. Sgt. Daniel Groh—		
direct	129	88
cross	136	93
Transcript of trial, April 19, 1966	154	104
People rest	155	104
Motions, rulings and colloquy thereon	155	104
Testimony of Allen M. Hanington—		
direct	184	121
Voir dire	193	126
cross	200	131
redirect	203	132
Reverend George L. Stowell—		
direct	207	135
cross	216	141
redirect	225	147
Sam Ginsberg—		
direct	242	156
cross	283	182
redirect	326	208
Transcript of trial, April 20, 1966	335	213
Testimony of Mrs. Pauline Ginsberg—		
direct	336	213
cross	340	216
redirect	361	228
Defendant rests	362	229
Testimony of Det. Albert C. Anderson— (rebuttal)—		
direct	363	229
cross	369	233
People rest	384	241
Defendant rests	384	241
Motions and colloquy thereon	384	241
Decision	396	247
Transcript of trial, May 17, 1966	401a	251
Sentence	402	251
Certificate of conviction, May 17, 1966	410	256

	Original	Print
Notice of appeal to the Appellate Term of the Supreme Court of the State of New York, Second Judicial Department, May 19, 1966	411	257
Judgment, January 20, 1967	413	259
Order amending judgment, January 30, 1967	414	260
Certificate denying leave to appeal to State of New York, Court of Appeals, Judge Scileppi, January 24, 1967	417	261
Notice of appeal to the Supreme Court of the United States	418	262
Order noting probable jurisdiction	422	264

[fol. A]

IN THE
APPELLATE TERM OF THE SUPREME COURT
OF THE STATE OF NEW YORK

SECOND JUDICIAL DEPARTMENT

410/66

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,

—against—

SAM GINSBERG, Appellant.

STATEMENT UNDER RULE 5531

1. The docket numbers are CR 3119/65 and CR 3125/65.
2. The full names of the original parties are: The People of the State of New York v. "John Doe" a/k/a Sam, Sam Ginsberg. There has been no change of parties.
3. The action was commenced in the District Court of Nassau County, First District.
4. The date the action was commenced is October 27, 1965 by the filing of an information on that date.
5. The informations charge violations of Section 484-h of the Penal Law.
6. The appeal is taken from a judgment dated May 17, 1966.
7. The appendix method is not being used.

[fol. B]

IN THE DISTRICT COURT OF NASSAU COUNTY

FIRST DISTRICT—ARRAIGNMENT PART

COURT OF SPECIAL SESSIONS

Before: HON. ALEXANDER VITALE, Judge, District Court.

THE PEOPLE OF THE STATE OF NEW YORK,

against

'JOHN DOE' a/k/a SAM c/o SAM'S STATIONERY,
1507 Bellmore Ave., Bellmore, N. Y.
SAM GINSBERG

INFORMATION—October 27, 1965

Before me, Hon. Alexander Vitale, Judge, District Court of Nassau County, New York, came the 27th day of Oct., 1965, Mary Corey and gave information and complaint as follows, to wit:

State of New York,
County of Nassau, ss.:

Mary Corey, being duly sworn, deposes and says that she resides at 2274 Woodbine Ave., Merrick, N. Y. and that on the 18th day of October, 1965, at 1507 Bellmore Ave., Bellmore, N. Y. in the County of Nassau, the defendant did wilfully, wrongfully and unlawfully violate the provisions of Sections 484-h subdivision 2(a) of the Penal Law of the State of New York, and Sec. 484-h subdivision 2(b) of the Penal Law of the State of New York, as follows:

First Count The defendant did violate the provisions of the said Sec. 484-h sub. 2 (a) of the Penal Law, in that the defendant did knowingly sell to a minor, pictures, photographs, visual representations and images of persons and portions of the human body which depict nudity and which are harmful to minors, to wit: the defendant did sell to Richard Lance Corey, 16 years of age, various of such

pictures, photographs, visual representations and images contained in a magazine known as 'Mr. Annual' and magazine known as 'Sir', which are attached hereto and made part hereof.

Second Count The defendant did violate the provisions of the said Sec. 484-h sub. 2 (b) of the Penal Law, in that the defendant did knowingly sell to a minor, a magazine which contains pictures, photographs, visual representations and images of persons and portions of the human body which depict nudity, and which, taken as a whole is harmful to minors, to wit: the defendant did sell to Richard Lance Corey, 16 years of age, a magazine known as 'Mr. Annual' and a magazine known as 'Sir' which are attached hereto and made part hereof. The foregoing complaint is based partially upon direct knowledge and partially upon information and belief. The complainant has direct knowledge of the contents of the aforesaid magazines by examining same. The source of complainant's knowledge and basis of her belief as to the sale by defendant to the said minor Richard Lance Corey, is the attached deposition of the said minor Richard Lance Corey.

Wherefore he prays that the said defendant may be arrested and dealt with in the premises according to law.

MARY COREY

Subscribed and sworn to before me this 27th day of Oct. 1965.

ALEXANDER VITALE, Judge, District Court of Nassau County.

[fol. C]
State of New York,
County of Nassau, *ss.*:

Richard Lance Corey, being duly sworn and examined in relation to the foregoing information, deposes and says: that I reside at 2274 Woodbine Avenue, Merrick, New York.

I am 16 years of age, being born on September 11th, 1949. I am the son of the complainant, Mary Corey. On October 18th, 1965 I purchased the attached magazines from the defendant, a person known as 'Sam' at 1507 Bellmore Ave., Bellmore, New York. I paid the defendant One Dollar ($1.00) for 'Mr. Annual' magazine and Sixty Cents ($.60) for 'Sir' magazine.

RICHARD LANCE COREY

Subscribed and sworn to before me this 27th day of October, 1965.

ALEXANDER VITALE, Judge, District Court of Nassau County.

[fol. D]

IN THE DISTRICT COURT OF NASSAU COUNTY

FIRST DISTRICT—ARRAIGNMENT PART

COURT OF SPECIAL SESSIONS

Before: HON. ALEXANDER VITALE, Judge, District Court.

THE PEOPLE OF THE STATE OF NEW YORK,

against

SAM GINSBERG, (48), 238 West Hudson St., Long Beach, N. Y.

INFORMATION—October 28, 1965

Before me, Hon. Alexander Vitale, Judge, District Court of Nassau County, New York, came the 28th day of October, 1965, Det. Albert Anderson and gave information and complaint as follows, to wit:

State of New York,
County of Nassau, *ss.*:

Det. Albert Anderson, being duly sworn, deposes and says that he is attached to Vice Sqd. NCPD and that on

the 26th day of Oct., 1965., at about 5:15 PM, 1507 Bellmore Ave., Bellmore, N. Y. in the County of Nassau, the defendant did wilfully, wrongfully and unlawfully violate the provisions of Sections 484-h sub. 2(a) of the Penal Law of the State of New York, and Sec. 484-h sub. 2(b) of the Penal Law of the State of New York, as follows:

First Count The defendant did violate the provisions of the said Sec. 484-h sub. 2(a) of the Penal Law, in that the defendant did knowingly sell to a minor, pictures, photographs, visual representations and images of persons and portions of the human body which depict nudity and which are harmful to minors, to wit: the defendant did sell to Richard Lance Corey, 16 years of age, various of such pictures, photographs, visual representations and images contained in a magazine known as 'Man to Man', and magazine known as 'Escapade' which are attached hereto and made part hereof.

Second Count The defendant did violate the provisions of the said Sec. 484-h sub. 2(b) of the Penal Law, in that the defendant did knowingly sell to a minor, a magazine which contains pictures, photographs, visual representations and images of persons and portions of the human body which depict nudity, and which, taken as a whole is harmful to minors, to wit: the defendant did sell to Richard Lance Corey, 16 years of age, a magazine known as 'Man to Man' and a magazine known as 'Escapade' which are attached hereto and made part hereof.

Wherefore he prays that the said Defendant may be arrested and dealt with in the premises according to law.

ALBERT ANDERSON

Subscribed and sworn to before me this 28th day of Oct., 1965.

ALEXANDER VITALE, Judge, District Court of Nassau County.

[fol. F]
State of New York,
County of Nassau, *ss.*:

IN THE NAME OF THE PEOPLE
OF THE STATE OF NEW YORK

To any Peace Officer in the State of New York:

Information upon oath having been this 27th day of Oct., 1965 laid before me Hon. Alexander Vitale, Judge, District Court of the County of Nassau, that the crime of Viol. Sec. 484-h sub. 2(a) & Sec. 484-h sub. 2(b) PL has been committed in the County of Nassau, N. Y., and accusing 'John Doe' a/k/a 'Sam' thereof.

You are, therefore, Commanded forthwith to arrest the above named ..... and bring him before me at the District Court of the County of Nassau, First District, held at Mineola, or in case of my absence or inability to act, before the nearest or most accessible magistrate in this County.

Dated at Mineola, Nassau County, N. Y., this 27th day of Oct. 1965.

ALEXANDER VITALE, Judge, District Court of the County of Nassau.

[fol. G]

DISTRICT COURT OF NASSAU COUNTY
FIRST DISTRICT

HELD AT MINEOLA

THE PEOPLE OF THE STATE OF NEW YORK,

against

'JOHN DOE' a/k/a SAM.

WARRANT

Charge:

Viol. Sec. 484-h sub. 2(a) PL
" 484-h sub. 2(b) PL
(2 counts)

The within warrant may be executed at night time or on Sunday.

ALEXANDER VITALE
Judge,
District Court of
the County of Nassau

I certify that I have executed the within warrant on the 28th day of Oct., 1965 and have arrested the defendant herein named and now have him before the said Judge, District Court of the County of Nassau.

C. Harrer
Police Officer

[fol. 1]

IN THE DISTRICT COURT OF NASSAU COUNTY
STATE OF NEW YORK—FIRST DISTRICT

Index No.: CR 3119/65

Sec. 484-h sub. 2(a) PL
Sec. 484-h sub. 2(b) PL

THE PEOPLE OF THE STATE OF NEW YORK,

—against—

JOHN DOE a/k/a SAM GINSBERG, Defendant.

Index No.: CR 3125/65

Sec. 484-h sub. 2(a) PL
Sec. 484-h sub. 2(b) PL

THE PEOELE OF THE STATE OF NEW YORK,

—against—

SAM GINSBERG, Defendant.

Before: HON. JULIUS CHINMAN, District Court Judge.

NON JURY

CRIMINAL PART V
First District Court
West Wing
Old Country Road
Mineola, New York

Transcript of trial—April 18, 1966

APPEARANCES:

William Cahn, Esq., District Attorney of the County of Nassau, Attorney for the People, By: Robert Rivers, Esq., Assistant District Attorney.

Morris J. Ezra, Esq., Attorney for Defendant, 253 Broadway, New York, New York.

Reported by:

Robert J. Hellman, Official Reporter.

[fol. 2]

Mr. Rivers: People ready.

The Court: Defendant ready?

Mr. Ezra: Yes, your Honor.

The Court: There are separate informations here.

MOTIONS, RULINGS AND COLLOQUY THEREON

Mr. Rivers: I have two motions to make at this time. I move for the trial of both counts of CR 3119 and both counts of 3125 together. I also move at this time to exclude all witnesses.

The Court: Let us take one motion at a time. You are moving to try these two cases together?

Mr. Rivers: Yes.

The Court: Any objection, Counsel?

Mr. Ezra: I have no objection, excepting of course, that each case is to stand on its own.

The Court: The motion is to try the two cases together. Of course separate judgments will be rendered.

Mr. Ezra: Thank you. I have no objection.

The Court: No exceptions?

Mr. Ezra: No exceptions.

The Court: The motion is granted. Now, the next motion is to exclude all witnesses?

Mr. Rivers: Yes.

The Court: Except the witness to be called.

[fol. 3] Mr. Ezra: No objection.

The Court: Whoever is a witness in this case will please leave the courtroom. You will keep yourself available for call.

Is the defendant present?

Mr. Ezra: The defendant is present, your Honor. He is right there, right at the window.

The Court: Let the record show that the defendant is present.

Mr. Ezra: At this time, with the Court's consent and permission, I would like to make a motion.

The Court: Go ahead.

Mr. Rivers: Pardon me. I don't like to interrupt. I would like to realize for the record whether or not Mr. Edwards is going to be the sole advocate for the defendant?

The Court: He is. There is only going to be one trial counsel.

Are you the trial counsel?

Mr. Ezra: Yes.

The Court: Have you noted your appearance?

Mr. Ezra: I have. At this time, with the Court's permission, I move to dismiss the information on the ground that the statute that the defendant has been charged with [fol. 4] a crime is unconstitutional in violation of the protections granted by the First and Fourteenth Amendments to the constitution of the United States and under Article I, Section 8 and Article I, Section 6 of the Constitution of the State of New York in that the said statute infringes upon the liberty of the press by preventing free distribution of literature to all persons, regardless of age.

I further move to dismiss the information and complaint on the ground that the statute under which the defendant has been charged with a crime is unconstitutional in violation of the protections granted by the First and Fourteenth Amendments to the Constitution of the United States and under Article I, Section 8 and Article I, Section 6 of the Constitution of the State of New York in that subdivision

484 h subdivisional is a denial of due process in that it is vague and indefinite.

I further move to dismiss the information—

The Court: (Interposing) Vague and indefinite in what respect?

Mr. Ezra: In that it does not specify just what is harmful to minors. In that it does not specify what is harmful [fol. 5] to minors in that it does not specify what is prurient, what is obscene and what it is because of the numerous decisions of our state courts, Court of Appeals. The United States Supreme Court decisions and numerous others would show a conflict in these various matters.

The Court: Well, the charge here is a very simple one, if I read the information correctly. The information—both informations are simply to the effect that allegedly the defendant sold material to a minor that is under 17 years of age which depicted nudity.

Mr. Ezra: Yes, your Honor.

The Court: Nudity.

Mr. Ezra: In some form.

The Court: In some form and nudity is defined in the section, so there is nothing vague about it.

Mr. Ezra: Well, of course—

The Court: There is nothing here about harmful to minors involved in this particular information.

Mr. Ezra: The information specifically says harmful to minors, your Honor.

The Court: But the charge is he violated the section of selling magazines which contain pictures containing some form of nudity.

Mr. Ezra: Correct, your Honor.

[fol. 6] The Court: That is under 484 h 1b, 1a and 1b. That is the whole charge.

Mr. Ezra: Yes, your Honor. Now, with respect to the age of the minors, I make a further motion, to dismiss the indictment on the ground that the statute under which the defendant has been charged with a crime is unconstitutional in violation of the protections granted by the First and Fourteenth Amendments to the Constitution of the

United States and under Article I, Section 8 and Article I, Section 6 of the Constitution of the State of New York in that it denies the defendant due process of law by placing an unconstitutional and undefined burden on the defendant to ascertain the age of an individual as a condition of a sale to him.

The Court: Do we not have the same thing in the Alcohol Beverage Control Law?

Mr. Ezra: Your Honor, no.

The Court: As far as determining age?

Mr. Ezra: No, your Honor. Because, there have been numerous decisions and we intend to prove it for your Honor, should your Honor require it and should the proof be such that your Honor will at the end of the entire case [fol. 7] or perhaps at the end of the People's case, reserve decision on motions to dismiss. It is all a question of what the proof will show so that we will leave it for your Honor so as to give your Honor the difference between the statutes, the scienter angle with respect to that set forth in the decisions concerning obscene nudity.

The Court: Wait a minute. We are getting away from the point. You said it placed an unfair burden, is unconstitutional because it placed an unfair burden upon the seller to determine a person's age.

Mr. Ezra: Correct, your Honor.

The Court: All I said to you was the same provision was in the Alcohol Beverage Control Law, making it illegal to sell liquor to a person under a certain age and that has been ruled constitutional.

Mr. Ezra: Excepting there would be different standards in proof of age. There, it is a licensed business to conduct a bar and grill or to conduct a restaurant that has a liquor license. Here, there is no license involved with respect to the sale of magazines.

The Court: All we are talking about is the proof of age. [fol. 8] Mr. Ezra: Yes. But, there would be different standards because there, a license depends on your conforming with the age standards. In fact, they say in the

decisions themselves, they have stated that you must seek proof of age before you serve a person. Here the law would be different, your Honor.

The Court: Here, it says you cannot sell if he is under 17.

Mr. Ezra: But, it does not impose a burden upon you to seek proof as to the age.

The Court: It does not?

Mr. Ezra: No. Where is it in that section? Will your Honor find it?

The Court: Go ahead.

Mr. Ezra: I further move to dismiss the information on the ground that the statute under which the defendant has been charged with a crime is further unconstitutional in violation of the protections granted by the First and Fourteenth Amendments to the Constitution of the United States and under Article I, Section 8 and Article I, Section 6 of the Constitution of the State of New York in that subdivision 484 h, both 1 and 2 both deny to the defendant [fol. 9] that knowledge or scienter as I have stated, your Honor. But, I am sorry I am repeating myself in this particular instance, but I further move to dismiss with respect to 484(h) subdivision 1b on the ground that there is a difference, as set forth in the statute, in that 484(h)1b specifically says, "photographs or other materials," "photographs," where as—2a, your Honor, states that it is photographs, whereas 2b, the other count of the information speaks of magazines in which photographs are depicted. Here, there is no question but that it is magazines alone. Am I right, Mr. Rivers?

The Court: Wait a minute. Wait a minute. You lost me here. First of all, without trying to determine how many angels can dance on the point of a pin, subdivision 1b defines nudity. And it says that nudity means a showing of the human male and so forth and so on: A showing. Now, a showing can be by one of several forms. It can be a painting. It can be a pen and ink drawing. It can be an alleged artistic rendering by a creator who does the draw-

ing himself or it can be a pictorial representation by mechanical means in which case it would be a photograph.

Now, the photograph can be an individual photograph or [fol. 10] it could be contained in a book. It does not make a difference, the means of transferring the showing. This is an immaterial fact as to how it is transmitted. The main thing is the transmittal or the sale of a showing of the body as defined by the State Legislature under Section 1b.

Mr. Ezra: This is 2a and 2b.

The Court: I am getting to that. Now, the State Legislature has enacted a law and it says in 2a and that is what we are here—Mr.— You are associate counsel?

Mr. Friedman: That's right.

The Court: There is only one trial counsel. I am not going to get involved with head shaking or any dramatic effect one way or another. I will have to bar you from the courtroom.

Mr. Friedman: I apologize.

The Court: 2a says, "It shall be unlawful for any person knowingly," that is your scienter, "knowingly," "to sell for a monetary consideration," that is for money, "to a minor," that means anybody under 17 years of age, "any picture, photograph, drawing, sculpture, motion picture film or similar visual representation or image of a person or por- [fol. 11] tion of the human body which depicts nudity." We can stop right there. These are matters or the mechanics of what the State Legislature says amounts to a showing. I do not see any conflict there.

Mr. Rivers: Your Honor, may I be heard?

The Court: You will get a chance to be heard when he is finished.

I am simply trying to clear our thinking.

Mr. Ezra: I understand, your Honor and I appreciate your Honor's interpretation of that statute, if you have so interpreted it.

Now, if your Honor please, if your Honor will read Section 2b, which forms the basis for count two of this information, your Honor will see the difference because that

sections goes on to say, "any photograph contained in a magazine," so that we have a difference and we have the reasoning of the Legislature in defining these two statutes in a different manner. Otherwise, there would have been no need to have broken it down to 2a and 2b.

The Court: You are saying this, that the information has a count on 2a, which is a mere sale of a showing and 2b is a sale which is harmful.

[fol. 12] Mr. Ezra: No, your Honor. No, your Honor. I am sorry if I have not made myself clear. In Section 2a, it says, "a photograph." Now, that photograph would have to be a photograph in and of itself, either on a postcard, just one sheet of paper or one postcard or one illustration.

The Court: It could be in a magazine.

Mr. Ezra: No, it cannot, according to this section, your Honor.

The Court: That is an interpretation I will make.

Mr. Ezra: Then, your Honor, on Section 2b, it goes on to say, "such a photograph within a magazine." So that we have two different counts here and I believe that the proof should be limited to that particular count because these are magazines which are in issue.

The Court: I will rule right now that any photograph that is contained in the magazine or any other matter that is sold to a minor comes within the provision of 2a.

Mr. Ezra: I respectfully except.

The Court: So we have a record.

Mr. Ezra: May I state at this time then, that this would be subjecting the defendant to double jeopardy, because [fol. 13] if he is here on two identical counts—

The Court: (Interposing) It is not two identical counts, Counsel.

Mr. Ezra: They are. They're photographs.

The Court: That is your interpretation. Let me make it very clear. You made a very detailed study of the thing and so has the District Attorney. I have read the section. The sections are two different sections. One, makes it a misdemeanor to sell a showing of the human body as

nudity. That is one crime. There is another crime, the word "or" is there. It is in the disjunctive. There is another crime. The other crime which is also a misdemeanor is to sell certain matter, which, taken as a whole, is harmful to minors. That is 2b.

Now, I would take it then that in order to find for the People to prove the defendant guilty of 2b, they would have to show that this matter or introduce matter which the Court will have to determine is harmful to minors.

That is one section. The other section is merely the [fol. 14] sale of the photographs.

Mr. Ezra: Also, which is harmful to minors.

The Court: This does not come into it, Mr. Ezra.

Mr. Ezra: The statute comes into it.

Mr. Rivers: I will now not attempt to go into a long discourse. I will attempt to answer all questions raised by Mr. Ezra. Based upon my reading of the background of this statute of 484-h, the Legislature of the State of New York has gone through a historical change with regard to 484-h.

The wording of the statute in the motions made by Mr. Ezra would have been better addressed to the old statute. Using the old statute, it prohibits the sale to minors under 18 years of age any book the cover of which exploits or is devoted to or is principally made up of descriptions of illicit sex or immorality, without setting definite standards.

That was the old standards. It was held under two cases which are the important cases here. People vs. Bookcase, Inc., 14 NY 409, that this language in and of itself was [fol. 15] vague and therefore in violation of the Fourteenth Amendment, denying due process and in violation of the First Amendment, abridging the freedom of the press.

It was also held under People vs. Kahan case at 15 N.Y. 2d 311, that the need for scienter was not spelled out in the old statute. The language under the People vs. Kahan case, by Judge Fuld and I read for the Court, that the Court of Appeals, "While the supervision of children's reading may best be left to their parents, the knowledge

that parental control or guidance cannot always be provided and society's transcendent interest in protecting the welfare of children justify reasonable juvenile regulation of the sale of material to them. It is therefore, altogether fitting and proper for a state to include in a statute designed to regulate the sale of pornography to children special standards, broader than those embodied in legislation aimed at controlling the dissimilation of such materials to adults. And I have no doubt that such a law punishing the sale or distribution to children, of matter deemed objectionable, under criteria that would not be permissible —that would not be permissible if applied to adults, may be drafted so as not to violate the Constitutional guaran- [fol. 16] tees of freedom of expression." And the Court cites Butler vs. Michigan, 352 U.S. 380; Jacobellis vs. Ohio, 378 U.S. 184 and 185 also Prince vs. Massachusetts 321 U.S. 158.

However, I would like to point out to the Court the leading case on the issue as to whether or not the State has the power to set standards for children as opposed to adults, to be found in Roth vs. the United States at 354 U.S. 476.

There has been a great deal of law and as a matter of fact, there has been opinion by the Government when this particular statute was passed. The Legislature judicially avoided using the words, "pornography" and headed their statute, "Unlawful materials." So that we are not concerned here, basically, within this case, whether or not the materials themselves were pornographic, but whether or not they violated the tenor of the statute with regard to the showing of nude portions of the body to a child. If, in fact and information, this decision here need not be shown that these materials or the materials before the Court were in fact pornographic, but that they did violate the standards as set down by the statute. As a matter of fact, the [fol. 17] statute is so clear as to spell out what is harmful to minors so that it makes unnecessary for the information there to be a decision aside from that which is found in the statute spelling out the meaning of harmful to minors.

I think that the arguments used by Counsel, as I stated in the beginning, would be fitting in keeping with the old statute and in light of the fact that there is no higher court decision with regard to this statute which came September 15, 1965, I think that this is a case of first instance here in this Court and within the Courts of this State and we have to try it on the issue with regard to the statute and how it spells out the various violations.

I don't know if I have covered everything.

The Court: Thank you very much, Mr. Rivers.

Mr. Ezra: If the Court please, just one further comment for guidance.

The Court: Yes. Go ahead.

Mr. Ezra: With respect to the statements made by Mr. Rivers, the section under subdivision 2b specifically says that it must be harmful to minors and it further says that [fol. 18] the publication must be taken as a whole and must be harmful to minors. It is in those words, right at the very last line of the section.

The Court: I read it, Mr. Ezra.

Mr. Ezra: So that I didn't want the record to show that what Mr. Rivers had said is exceeded to by me, your Honor.

The Court: All Mr. Rivers says is that Legislature, in its infinite wisdom has defined what it means by "harmful to minors" as a guide to the Court.

Mr. Ezra: And of course, the Courts have too, interpreted, "taken as a whole," means, in various decisions, which your Honor will be acquainted with—

The Court: Under this section.

Mr. Ezra: Under this section.

The Court: It means looking at the whole picture and all the facts.

Mr. Rivers: I would not like to belabor the point. What the Counsel said is a matter of semantics, that it is impossible for us, for the People to prosecute based upon the violation under the second count of 484-h with regard [fol. 19] to the magazine itself. If we are going to prosecute under 484-h, subsidivision 2a, that's the distinction

between subdivision 2a and 2b. 2b is the prohibition against the magazines and 2a being the prohibition against the showing. Counsel is engaged in a semantic discussion.

The Court: I have ruled on it. I have already said, as far as I am concerned, if there is a picture depicting nudity, it does not make any difference to this Court whether it is a single picture or embodied in a magazine. It is simply a method of transmittal, that is all.

Mr. Ezra: Am I to understand that your Honor is reserving decision on these motions or have you denied them?

The Court: I have denied your motions to dismiss?

Mr. Ezra: Correct, your Honor.

The Court: They are denied.

Mr. Ezra: Because if your Honor will hold off the decision on that, if your Honor will reserve decision, perhaps the briefs which will be presented will be of some help.

The Court: If you want me to reserve decision, I will do so.

[fol. 20] Mr. Ezra: I do.

Mr. Rivers: I don't believe it is possible on the part of the Court, if we try a case, if there is a motion of this type in the beginning of the case and then we go to try the case, I think this is error in and of itself. If it is unconstitutional at the beginning, it is unconstitutional.

The Court: My immediate remarks and my original course of procedure here is correct.

Mr. Ezra, your motions are denied at this time and without prejudice to renewing them at the end of the People's case or at the end of the case as a whole. But, at this time, for the purpose of proper procedure, your motions are denied.

Mr. Ezra: Thank you, your Honor. I respectfully except.

The Court: Are you ready?

Mr. Rivers: Yes. The People are ready. The People call Richard Lance Corey.

RICHARD LANCE COREY, a witness on behalf of the People, residing at 204 Woodbine Avenue, Merrick, New York, after first being duly sworn, testified as follows:

Direct examination.

By Mr. Rivers:

[fol. 21] Q. Mr. Corey, how old are you?
A. 16.

Mr. Ezra: I object to that, if the Court please. It is not the best evidence.

Mr. Rivers: Will you take it not for the proof of the fact that he is in fact 16, but for the testimony itself? There is a way of proving age. However, this is the preliminary question and we do not intend to prove age this way.

The Court: I will take it at this time subject to further proof.

Mr. Ezra: Respectfully except.

Q. Now, on the day of October 26, 1965, how old were you?
A. 16.
Q. On the date of October 18, 1965 how old were you?
A. 16.

Mr. Ezra: Your Honor, may we have a standing objection with respect to these questions? I believe they are conclusions. Not the best evidence. No proper foundation has been laid for the giving of this testimony.

The Court: Your objection is overruled at this time.

[fol. 22] Q. Now, do you attend school, Richard?
A. Yes, sir.
Q. What school do you go to?

The Court: Mr. Corey, you see that back wall there. Make believe somebody is standing back there and you want them to hear you. You go to Mepham High School.

Q. You have to speak distinctly and let everybody hear what you have to say.

A. Yes, sir.

Q. You reside at home with your parents?

A. Yes, sir.

Q. Are there any other children in the family other than you?

A. Yes, sir. Two sisters, one brother.

Q. Now, I call your attention to the date of October 18, 1965 and I ask you did you have occasion to visit Sam's luncheonette and stationery store on that date?

A. Yes, sir.

Q. And where is that located?

A. That's on Bellmore Avenue, in North Bellmore.

Q. Who were you with at that time, if anyone?

[fol. 23] A. I think I was by myself.

Q. At what time did you go there?

A. I'm not sure of the date. It might have been the time I went with my father. He was waiting outside.

Q. Let me ask you this. How many times have you gone there?

A. A good 50 times.

Q. During the month of October, how many times did you go there?

A. About five, seven times. Five times, seven times.

Q. Now, on the 18th day of October, were you there?

A. Yes, sir.

Q. Now, did you make a purchase there?

Mr. Ezra: I object to it, if the Court please. It is a conclusion.

The Court: Ask him what he did. I will sustain the objection.

Q. What did you do?

A. I bought two magazines.

Mr. Ezra: I object to it, if the Court please, unless the circumstances are set forth. It is a conclusion when he [fol. 24] says he bought.

The Court: Tell me what you did. I am going to sustain your objection at this particular time, solely for the purpose of getting this record straight.

Now, you went into Sam's luncheonette?

The Witness: Yes.

The Court: Now, tell the Court what you did when you went in there? Give me in detail what you did?

The Witness: I walked in. I knew Sam pretty well. I said, "Hi," to him.

The Court: He said, "Hi," to him. You have no objection to that?

Mr. Ezra: No objection to that, excepting that no hour has been fixed with this testimony. I heard no hour mentioned.

The Court: At what time of day was it?

The Witness: I'm not exactly sure of the date.

The Court: Was it morning?

The Witness: No, sir.

The Court: Was it in the afternoon?

The Witness: The chances are it was about dinner time.

[fol. 25] The Court: Six or seven o'clock?

The Witness: Yes.

The Court: This is on October 18th?

The Witness: Yes, sir.

By Mr. Rivers: (Continuing)

Q. Now, tell us step by step what did you do?

A. I took a look at the magazines on the book rack. I picked up two magazines, I think it was. I'm not exactly sure how many magazines it was and I went up to Sam and paid him the money for them.

Q. You went to Sam?

A. Yes, sir.

Q. You have to go slow and you have to tell us what happened.

A. That's about all I can remember.

Q. Where was Sam?

A. Behind the counter.

Q. And how is the counter situated with respect to the magazine rack?

A. It's off on an angle. Almost directly across from the magazines.

Q. How long a counter is it?

A: 30 feet. 25 feet.

Q. How long a magazine rack is it?

[fol. 26] A. About 10 feet long.

Q. So you have a counter on one side of the wall and a magazine rack on the other side; is that right?

A. Yes, sir.

Q. Now, how are the magazines situated on the magazine rack?

A. All the Playboys and magazines like that are on the left side of the rack and there is also magazines for cars and body building and also comic books.

Q. I show you this and ask you whether or not this is a reasonable representation of the magazine rack as it appeared?

The Court: As it appeared when?

Q. On the date of 18th of October, 1965?

A. Yes, sir.

Mr. Rivers: Let me show it to Counsel. (Handed.)

Mr. Ezra: Are you offering it, Mr. Rivers?

Mr. Rivers: Yes.

Mr. Ezra: I have no objection.

The Court: Receive it in evidence. People's Exhibit 1.

(Whereupon the picture was received and marked People's Exhibit 1 in evidence.)

[fol. 27] Mr. Ezra: Your Honor, I don't want to belabor the record, but may we have the record show that that is part of a magazine rack in the place; is that right?

Mr. Rivers: It is not the entire rack. Part of the rack.

Mr. Ezra: As long as the record shows that.

The Court: Both counsel agree that People's Exhibit 1 shows part of a magazine rack in Sam's place of business.

Q. Now, there came a time, Richard when you removed from this rack some magazines; is that right?

A. Yes, sir.

Q. Let me ask you this, Richard. Did you have money with you at the time?

A. Yes, sir.

Q. How much money did you have with you?

A. Generally about $2.00.

Q. About $2.00?

A. Yes, sir.

Q. Now, do you recall which magazines you removed from the rack on the 18th of October?

A. Not really, sir. No.

Mr. Rivers: May I have the original information? [fol. 28] (Handed)

Q. Richard, I show you these two magazines—

Mr. Ezra: I object, if the Court please. These are leading and suggestive.

The Court: The way it is stated, he does not know what magazines he took off the rack.

Mr. Rivers: He has no recollection.

Mr. Ezra: The defendant—

Mr. Rivers: (Interposing) Pardon me. The complainant has indicated he has no recollection. I am attempting, through this means of refreshing his recollection. I think this is standard.

Mr. Ezra: Your Honor, I certainly disagree with what the District Attorney says is standard. I think that we have to go on his word that he does not know. I object to any line of interrogation along those lines. I believe it is leading and suggestive.

Mr. Rivers: If there is something in the courtroom that refreshes the witnesses recollection, it can be used. If it does not, then, of course, his recollection is not refreshed.

Mr. Ezra: This is a criminal proceeding, your Honor.

The Court: I understand it is a criminal proceeding. [fol. 29] Tell me, Mr. Corey, you went and bought two magazines.

The Witness: Yes, sir.

The Court: What kind of magazines were they? Were they magazines for automobiles?

The Witness: They were girly magazines.

Mr. Ezra: I object to it, if the Court please. I move that it be stricken out.

The Court: This is his memory.

Mr. Ezra: But, your Honor, how can he designate what a magazine is? Is he an expert?

The Court: You are overruled.

Mr. Ezra: I respectfully except.

The Court: What kind of magazines were they? Were they for automobiles or what kind of subject matter did they deal with?

The Witness: Nudes.

The Court: They had nudes in it?

The Witness: Of girls.

The Court: Now, do you remember specifically the names of the magazines you bought on the 18th?

The Witness: No, sir. I don't.

The Court: Show him those magazines. (Handed) Your objection, Mr. Ezra, is overruled.

By Mr. Rivers: (Continuing)

[fol. 30] Q. I show you these magazines and ask you whether or not they refresh your recollection regarding the magazines purchased on the 18th?

A. Yes, sir.

Mr. Ezra: Your Honor, I object. It would be more appropriate if he were shown a group of magazines and have him pick them out and not have them show him what is mentioned in the complaint. I believe that's contradictory to the rights of this defendant.

The Court: Overruled.

Mr. Ezra: Respectfully except.

The Court: Now, you have looked at those magazines?

The Witness: Yes, sir.

The Court: Now, does that refresh your recollection any as to the actual magazines you bought that day?

The Witness: Yes, sir. My initials are on the magazines.

The Court: Your initials are on the magazines?

The Witness: Yes, sir.

The Court: When did you put those initials on?

The Witness: The detective told me to put them on the day I purchased them.

[fol. 31] Mr. Ezra: Can your Honor ask him when did he put them on? We have had no answer.

The Court: He said the detective told him to put them on.

Mr. Ezra: We—

The Court: (Interposing) There is no jury here. Let's stop camouflaging it.

When did you put them on?

The Witness: The day I purchased them.

The Court: That was on the 18th of October?

The Witness: Yes.

Q. What are the names of the two names of the magazines you purchased?

A. "Sir" and "Escapade." "Mr. Annual". I remember buying "Escapade."

Q. These are the magazines you bought at the location—

Mr. Ezra: I object, if the Court please, with reference to the word, "purchased." I still say we have a statute to deal with here, your Honor.

The Court: Do you want me to have the record read, Mr. Ezra? Now, Mr. Reporter, go back to the part where he says he picked two magazines off the stand, and he went over to Sam. Pick up that part of the record.

[fol. 32] (Pertinent portion of record read back by Reporter.)

The Court: Mr. Ezra, that is a purchase. He went up to somebody and paid them for it. That is a sale and purchase. Let's not play with semantics.

Mr. Ezra: I do not mean to belabor it. I do not want to test your Honor's patience.

The Court: I have a world of patience. But, I do not see any need of playing with semantics. If a person gets up and takes a piece of merchandise and pays for it, that is a sale and that is a purchase.

Mr. Ezra: Now, your Honor, would you please excuse this witness for one minute and let me—

The Court: All right. Step outside. Do not discuss this with anybody. Do not tell anybody what you have said in this courtroom, anybody out there. As a matter of fact, put an attendant with him.

(Whereupon the witness is excused and leaves the courtroom.)

Mr. Ezra: Your Honor, this is a technical situation. The reason that I am raising the objection is—that I am raising it is because the statute says "knowingly sold." Now, until that has come into the case, it cannot be considered a sale [fol. 33] in accordance with this statute.

The Court: Now, Mr. Ezra, don't do that with me. "Knowingly Sold," are two different elements of the crime. One is the sale and the other is with knowledge. We have gotten so far testimony that there has been a sale. Whether or not the defendant here knew what he was selling is something else. Let's not play games with words. There is going to be a recess for about two minutes. You understand my ruling. The witness has testified that he went up and he paid for them. That is a sale. That is a purchase. Let's move on in this case.

(Whereupon there was a recess.)

(After the recess the trial is resumed.)

The Court: Read the last question, Mr. Reporter.

(Whereupon the pertinent question was read by the Reporter.)

A. Yes, sir.

Q. Richard, you testified that you had about $2.00; is that right?

A. Yes, sir.

Q. Could you tell the Court how much you paid for these magazines?

A. About $1.50, $1.60.

[fol. 34] Q. Did you pay for the magazines separately or together?

A. Together.

Q. Could you tell the Court was anyone else in the store —withdrawn. You stated that you know Mr. Ginsberg; is that right? You knew him prior to this date?

A. Yes, sir.

Q. Now, was Mr. Ginsberg in the store at the time?

A. Yes, sir.

Q. Was anyone else in the store waiting on customers at the time?

A. No, sir.

Q. Now, where was Mr. Ginsberg situated at the time —listen to the question. At the time you picked up the magazines?

A. Behind the counter.

Q. Where was he situated at the time you paid for the magazines that you testified to?

A. He came to the end of the counter.

Q. To the end of the counter?

A. Yes, sir.

Q. Could you tell the Court—withdrawn. Can you explain to the Court how it was that you paid for the maga-

[fol. 35] zines?

A. I pulled the dollar bills out of my back pocket. I held the magazines out flat.

Q. Where did you hold the magazines?

A. In my hand.

Q. Were they in your hand?

A. Yes, sir.

Q. Did you ever place them on the counter?

A. No, sir.

Q. Do you recall with respect to the magazines whether or not they were both in one hand?

A. Yes, sir.

Q. What, if anything, did Mr. Ginsberg do when you offered to pay for the magazines?

A. He looked down at the magazines, told me how much they cost.

Mr. Ezra: I object to that and move that it be stricken out.

The Court: On what ground?

Mr. Ezra: It's a conclusion of this witness. "He looked at the magazines."

Mr. Rivers: He didn't say he saw them.

The Court: Mr. Rivers. Let's not prolong this trial with a lot of unnecessary bickering. There is an objec-
[fol. 36] tion made. You object to the testimony that he looked down at the magazine?

Mr. Ezra: Yes, your Honor.

The Court: This is something the witness says he saw. Overall. He looked down at the magazines?

The Witness: Yes, sir.

The Court: Then he told you the price?

The Witness: Yes, sir.

Q. Now, Richard, tell me this. How is it—how was it possible, based upon your observation on this date, for Mr. Ginsberg to look at two magazines when you had both of them in your hand?

Mr. Ezra: I object, if the Court please. That calls for an operation of the mind.

The Court: I will sustain the objection to the form of the question.

What happened here at the time he looked down, anything?

The Witness: No, sir. I just held the magazines in my hand. He named the price and I agreed with him and I paid him the money and he gave me my change.

Q. Was there any conversation between you and Mr. Ginsberg at this time?

A. I said, "Hi Sam." That was all.

[fol. 37] Q. When the transaction was taking place, was there any conversation?

A. I asked him how much.

Q. And at that point when you said, "How much?" what did he do, if anything?

A. He looked down and told me the price.

The Court: Who looked down at what?

The Witness: At both magazines.

The Court: At both magazines?

The Witness: Yes, sir.

The Court: He saw both magazines?

The Witness: Yes, sir.

The Court: How did you have them in your hand? In what position were they?

The Witness: Can you hand me the magazines for a second and I will show you. (Handed.) I held the magazines so both—well, for these magazines, the prices are in different corners. So, I had to hold them like this. (Indicating) Most of the magazines have the prices here and here (Indicating) so I hold them like this.

The Court: You held both magazines with the prices showing; is that it?

The Witness: Yes, sir.

The Court: You showed him the magazines?

[fol. 38] The Witness: Yes.

The Court: Let the record show that he had the magazines in the left hand and that they were off center so that the prices of each magazine showed.

Q. Now, Richard, do you see Mr. Ginsberg in the courtroom?

A. Yes, sir.

Q. Indicate him to the Court?

A. Behind the wall. The man with the gray hair.

Mr. Rivers: May we have the record indicate that the witness has pointed to the defendant?

The Court: He is the defendant, is he not, Counsel?

Mr. Ezra: Yes.

The Court: Let the record show the witness pointed to the defendant.

Mr. Rivers: Your Honor, I would like for a moment to ask the Court whether or not—Counselor—

Mr. Ezra: Yes?

Mr. Rivers: (Continuing) These magazines that are referred to in the information and are attached to the information, whether or not they are before the Court?

The Court: No, they are not in evidence yet, Mr. Rivers. They are only part of an information and an information [fol. 39] is not evidence.

Q. Now, Richard, with respect to these two magazines, what did you do with them then, after you left the store?

A. If I'm remembering right, my father was waiting outside for me and I handed them to him.

Q. Now, prior to this occasion, the 18th, had you visited the store?

A. Yes, sir.

Mr. Ezra: I object to that, if the Court please.

The Court: Was this prior to the 18th?

Mr. Rivers: Yes. Now, your Honor, I ask the Court to take this testimony subject to connection and subject to the issue of scienter, which is the requirement within the statute. There is an issue based upon the wording of the statute under subdivision g, "knowingly" means "having general knowledge of or reason to know or a belief on the ground or grounds for belief which warrants further inspection or inquiry." I think that this is an issue which is a burden upon the people. I think that I have to offer this type of testimony to indicate that.

The Court: Well, I will take it subject to connection. If [fol. 40] it is not connected, I will entertain a motion to strike.

Mr. Ezra: And the Court will take notice of the fact that this information does not set forth any material, excepting that shown in the information with respect to a given date.

The Court: All right. Go ahead, Mr. Rivers.

Q. On those prior occasions, did you make purchases of other magazines?

Mr. Ezra: I object to it again, your Honor.

The Court: I said I will take it. You have a blanket objection. I will take it subject to connection. If he does not connect it, we will strike it.

Mr. Ezra: Thank you.

A. Yes, sir.

Q. With regard to those magazines, did you go home with them? Did you take them to your home?

A. Yes, sir.

Q. As a result of that, not telling me the result of the conversation, but, did you have a conversation with your mother?

A. Yes, sir.

Q. And as a result of that conversation, did there come a time when your mother and yourself and your brother, [fol. 41] returned to that store and that is Sam's luncheonette and stationery store at 1507 Belmont Avenue, Bellmore Avenue?

A. My mother returned with my brother when I wasn't with her. That was during school time.

Q. You don't know about that. Now, do you know of your own knowledge what happened with respect to these magazines after you left the store and gave them to your father?

A. Yes, sir. He held on to them and the next day the two detectives came by and we gave them to them.

Q. Were you present at that time?

A. I think so. Yes, sir.

Mr. Rivers: Now, your Honor, I offer these magazines in evidence as separate exhibits.

The Court: Show it to counsel. (Handed)

Mr. Ezra: Respectfully object to the introduction in evidence, your Honor, on the ground that the People have failed to show that this was a purchase in accordance with the statute.

The Court: All right. Overruled. Receive them in evidence. People's Exhibit 2 and 3.

(Whereupon the magazines were received and marked People's Exhibit 2 and 3 in evidence.)

Mr. Ezra: Respectfully except.

[fol. 42] The Court: "Sir" is marked Plaintiff Exhibit 2 and "Mr. Annual" is marked People's Exhibit 3.

Q. Now, Richard, I call you attention to the date of the 26th day of October, 1965 and I ask you whether or not you had occasion on that date to return to Sam's luncheonette at 1507 Bellmore Avenue, Bellmore, New York?

A. Yes, sir.

Q. Can you tell me at about what time—

A. (Interposing) I remember it was about 4:00.

Q. About four?

A. Yes.

Q. Was anybody else with you at that time?

A. Yes, I arrived there with two detectives.

Q. Do you know the detectives' names?

A. One detective is Detective Anderson. I'm not quite sure of the other's name.

Q. Did you go into the store?

A. Yes, sir.

Q. Did the detective go in with you?

A. One detective was already sitting down at the counter having coffee. Just as I gave the money to Sam for the magazines, I purchased, Detective Anderson came in, I think and asked for a pack of cigarettes.

[fol. 43] Q. What did you do on that occasion?

A. I asked for—I picked up some magazines. I asked how much it was going to cost me for them.

Q. Who did you ask?

A. Sam.

Q. Where was Sam when you made this inquiry?

A. At the end of the counter.

Q. How close was Sam to you when you asked him this?

A. Two feet away.

Q. Was anyone else in the store waiting on anyone at the time?

A. No, sir. I don't think so.

Q. What were the names of the magazines you picked up on this date, the 26th?

A. I think one was "Escapade." I'm not sure of the other one.

Q. Did there come a time when you gave money to someone?

A. Yes, sir.

Q. Who did you give the money to?

A. Sam.

Q. How much money did you give to him?

A. It was about $2.00. $1.50. $2.00, at the most.

[fol. 44] Q. Did you get any change?

A. Yes, sir.

Q. I show you these two and ask you whether or not you recognize them?

A. Yes, sir.

Q. What do you recognize them as?

A. "Escapade" and "Man to Man."

Q. When did you see them before today?

A. The day I bought them.

Q. That was on the 26th?

A. Yes, sir.

Q. Now, after you took these magazines and gave Sam the money that you testified that you gave him, what did you do with them?

A. I gave them to the detectives.

Q. Which detectives did you give them to?

A. I think it was Detective Anderson.

Mr. Rivers: May I ask that these be marked for identification?

The Court: Mark them for identification. People's 4 and 5 for identification.

(Whereupon the two magazines were marked People's Exhibits 4 and 5 for identification.)

Q. At the time of this purchase from Sam, was any conversation between yourself and Sam—

[fol. 45] A. (Interposing) I just said, "Hello," and "How much."

Q. When you said, "Hello," what did he say?

A. "Hi Lance."

Q. With respect to People's Exhibit 4 and 5 for identification, did you do anything else with them prior to giving them to Detective Anderson?

A. No, sir. Just walked outside and gave it to Detective Anderson.

Q. Let me see the magazine. (Handed.) Richard, did you go with Detective Anderson any place?

A. Back to his car.

Q. Is that it?

A. Yes, sir.

Q. Since you gave them to Detective Anderson, have they have been in your possession?

A. No, sir.

Q. I ask you again, did you do anything with the magazines besides giving them to Detective Anderson?

A. I looked at the covers.

Mr. Ezra: I object. It's already been answered.

The Court: Overruled. What did you see?

The Witness: I looked at the cover, that was about all.

The Court: Did he see these magazines yet?

[fol. 46] Mr. Rivers: I don't know. Will you show the magazines—

The Court: (Interposing) Have you looked at these magazines yet?

The Witness: Well, Detective Anderson went through it. I was looking over his shoulder. That's all I seen of them.

The Court: Show him those two magazines. (Handed) Now, I want you to look at those magazines. Have you looked at them?

The Witness: I remember this one for sure.

The Court: How do you remember that, "for sure?"

The Witness: Because of the girl.

The Court: For no other reason?

The Witness: I remember "Escapade" and the girl because it went pretty far.

The Court: How about the other one. Do you remember that?

The Witness: Yes, sir.

The Court: How do you remember that?

The Witness: Well, the girl looks a lot like Carol Doter (phonetic).

The Court: Is that how you remember it?

The Witness: This one, yes, sir.

[fol. 47] The Court: For no other reason?

The Witness: No, sir.

The Court: All right.

Q. Richard, you have looked at the magazines thoroughly?

A. Well, my initials are on there.

The Court: Who put your initials on there?

The Witness: I did.

Q. So, you did something with the magazines prior to giving them to Detective Anderson?

The Court: Mr. Corey, please listen to the questions. How high did you go in school? What grade are you in?

The Witness: 11th.

The Court: Now, I asked you twice to look at the covers of those magazines and tell me if there is anything in there that you remember.

The Witness: Detective Anderson asked me to put my initials on.

The Court: Did you put your initials on?

The Witness: Yes, sir.

The Court: That is in your writing on there?

The Witness: Yes, sir.

The Court: Go ahead, Mr. Rivers.

Mr. Rivers: I offer the magazines in evidence.

[fol. 48] Mr. Ezra: I have the same objection.

The Court: What objection?

Mr. Ezra: As the other ones. On the ground that there has been no showing of scienter on the part of the defendant.

The Court: The scienter has nothing to do with the purchase of the magazines themselves.

Mr. Ezra: Correct, your Honor.

Mr. Rivers: The scienter is part of the overall case, your Honor and I haven't finished the case.

The Court: I know it. Overruled. You are talking about knowingly sold?

Mr. Ezra: Correct.

The Court: The phraseology in the statute says, "knowingly sold to a minor."

Mr. Ezra: Correct, your Honor.

The Court: All he is doing now is proving the sale.

Mr. Ezra: Respectfully except.

Mr. Rivers: I offer them in evidence.

The Court: Any objection other than that?

Mr. Ezra: I have no objections.

The Court: Receive them in evidence. People's Exhibit 4 and 5 in evidence.

[fol. 49] (Whereupon the two magazines were received and marked People's Exhibits 4 and 5 in evidence.)

Q. Now, Richard, on these two occasions, on the occasion of October 26 and the occasion of October 18th, did

you have any conversation with Mr. Ginsberg with respect to the purchase of these magazines?

Mr. Ezra: I object to that, it having been already answered.

The Court: Overruled.

A. I said, "Hello," to Sam and asked him how much the magazines cost. That's about all.

Q. On the date of the 26th of October, did anyone tell you which magazines to purchase?

A. No, sir.

Q. On the 18th of October, did anyone tell you which magazines to purchase?

A. No, sir.

Mr. Rivers: No further questions from this witness.

The Court: You may examine, Mr. Ezra.

Cross examination.

By Mr. Ezra:

Q. Now, Lance, back on the 18th of October of 1965, you were then 16 years of age, you said; is that cor-
[fol. 50] rect?

A. Yes, sir.

Q. And were you then in the same grade in school that you are in now?

A. Yes, sir.

Q. And that is the 11th grade; is that correct?

A. Yes, sir.

Q. Now, you have bought magazines before, have you not, like "Reader's Digest" and other magazines of that type?

A. No, sir. We got those through the mail.

Q. Have you bought any racing car magazines at all or sporting magazines of any kind prior to the 18th day of October, 1965?

A. No, sir.

Q. Did you ever buy "Look" or any other magazine?
A. No. We get those through the mail.
Q. All of those, sir, you get through the mail?
A. "Look," "Life," and "Reader's Digest."
Q. Well, are you interested in sports in any way?
A. Yes, sir.

Mr. Rivers: I object to that. It's irrelevant.
The Court: It is cross-examination. Let's see what his point is. Overruled.

[fol. 51] Q. Are you?
A. Yes.
Q. And in order to keep up with baseball or basketball or hockey or any of those sports which you may be interested in, have you ever purchased a magazine in connection with those sports?
A. No, sir.
Q. Now, in connection with your schooling, have you had to purchase any magazines of any kind?
A. No, sir.
Q. Have you had to purchase books to read in connection with your schooling?
A. No, sir.
Q. Do you buy newspapers, Lance?
A. My mother gets the newspapers.
Q. But you don't?
A. I read it anyway. She brings it home.
Q. But you have never bought any book, any magazine, any newspaper in all of your years?
A. In connection with school, no.
Q. Now, in connection with what have you purchased magazines or newspapers or books?
A. I go to the library to take out books.
Q. But have you purchased any books?
A. No, sir.
[fol. 52] Q. Now, just so that I may understand specifically Lane, you have never in all of your lifetime bought a newspaper? Is that correct?

A. Once or twice, yes, sir. I used to have a paper route.

Q. Now, when you bought that newspaper, did you know the price of the newspaper?

A. Yes, sir.

Q. And is the price on the newspaper itself?

A. Yes, sir.

Q. Now, was the price of the magazines that you bought from Mr. Ginsberg on those magazines?

A. Yes, sir.

Q. Did you see the price on there?

A. Yes, sir.

Q. You knew what the prices were, didn't you?

A. Yes, sir.

Q. So that when you say that you went over to Mr. Ginsberg and you asked him how much, you knew how much they were, didn't you?

A. I didn't know if he knew.

Q. But you knew, didn't you?

A. Yes, sir. But, why should he take my word?

Mr. Ezra: I move that it be stricken out, your Honor.

[fol. 53] The Court: No. Let it stay.

Mr. Ezra: All right.

Q. This was Mr. Ginsberg's store, was it not, Lance?

A. Yes, sir.

Q. And he was selling magazines and newspapers and cigars and lunch and everything else, wasn't he?

A. Yes, sir.

Q. Did you ever buy a sandwich in there or a malted or anything like that?

A. Yes, sir.

Q. When you went in there on occasion—I will withdraw that for the moment. Now, had you ever discussed nudity at home with your mother or father or other members of your family?

A. Yes, sir.

Q. Did you know the various parts of the body?

A. Yes, sir.

Q. Did you ever look at your own body, Lance?

A. Yes, sir.

Q. Did you find anything indecent about that?

Mr. Rivers: I object.

The Court: I sustain the objection. Now, Mr. Ezra, I think you are going a little far afield. I know the purpose [fol. 54] of your cross-examination is with respect to the testimony that this defendant has given. It is also to show —to attack his credibility. You are going into fields which have nothing to do with the testimony that this man has given. If you want to prove something, you prove it by your own witnesses. You are not going to make this boy an expert as to what is prurient or obscene.

Mr. Ezra: I don't intend to do that.

Mr. Rivers: I would like to raise the objection that this is not within the grounds of the necessary proof. It's not an issue in this case.

The Court: That is exactly what I said in other words.

Mr. Ezra: These magazines that you say have come to your home by subscription. Can you tell us what those magazines are, Lance?

Mr. Rivers: I'm going to object. This is irrelevant and immaterial.

The Court: I do not see any connection here, Counselor. I really do not. If you are trying to test his credibility or memory, possibly that is one way of doing it.

What magazines he gets at home has to do with the [fol. 55] charge here, I do not see any relevance.

Mr. Ezra: I will attempt to show it, if your Honor will let me.

The Court: Suppose you tell me what relevance it has. There is no jury that will be impressed.

Mr. Ezra: Of course there is no jury.

The Court: Tell me what the relevance is with respect to the magazines he gets at home and what he gets in the store?

Mr. Ezra: As to what they contain.

The Court: It has nothing to do with it at all. Objection sustained.

Mr. Ezra: Respectfully except.

The Court: All right.

By Mr. Ezra: (Continuing)

Q. Is Reader's Digest one of the magazines that come to your house by mail?

A. Yes, sir.

Q. Do you read Reader's Digest?

A. Yes, sir.

Q. Specifically, have you seen any pictures similar or of the same type or nature in Reader's Digest that you saw in these magazines which you say you purchased from Mr. Ginsberg's store?

[fol. 56] A. No, sir.

Q. Now, are you acquainted with a magazine known as "Time"?

A. Yes, sir.

Q. Is that one of the magazines which comes to your home by subscription?

A. No longer. No, sir.

Q. No what?

A. We used to get it, but no longer though.

The Court: Now, Counselor, I am going to stop this right now. You confine yourself to cross-examination of this witness with respect to the testimony he has given and with respect to attacking his credibility. Those are the limits of your cross-examination. If you want to introduce any new matter, then you call him as your own witness. I am not going to have this trial cluttered up with a lot of extraneous, irrelevant, immaterial matter at this time.

Mr. Ezra: I trust your Honor is not angry with me. I'm doing the job for my client and I'm doing it in the best way I know how.

The Court: I am not angry at all.

Mr. Ezra: Your tone is that of anger.

[fol. 57] The Court: Let the record show that my tone is not of anger. Now, Mr. Ezra, you listen to me. What is the scope of your examination? You tell me. What is the legal scope of your examination?

Mr. Ezra: Cross-examination to a defendant is of a wide scope, your Honor.

The Court: Tell me what the limitations are.

Mr. Ezra: Well, as far as the limitations, your Honor is the Judge and rules on them. Of course, I don't go further with respect to it.

The Court: I have ruled now what is contained in "Time" magazine; what is contained in "Reader's Digest"; what is contained in "Webster's Dictionary" in the public library, have nothing to do with this case.

Mr. Ezra: Of course, I take exception.

The Court: As far as the cross-examination of this witness is concerned.

Mr. Ezra: All right.

Q. Now, where, in relation to Mr. Ginsberg's store do you live, Lance?

A. South of the store, about a mile.

Q. Are there stores nearer to your home of the same [fol. 58] nature that Mr. Ginsberg has?

Mr. Rivers: I am going to object unless we can make that more definite.

The Court: I am going to allow it to see where it is going to go. It may be valid as far as credibility is concerned.

A. About the same distance.

Q. There is no store nearer to your house than Mr. Ginsberg's store, is that what I am to understand, that sells newspapers, magazines, candy, cigars, ice cream and the like; is that correct?

A. There's a store closer, but it doesn't sell magazines.

Q. It doesn't?

A. No.

Q. All right. So that the nearest store that does sell magazines is this store?

A. Same distance as all the others.

Q. How long have you lived in Merrick? Is that where you live?

A. Yes, sir.

Q. How long have you lived there, Lance?

A. All my life.

Q. Is there a store that sells newspapers and magazines [fol. 59] in the vicinity of the school that you attend?

A. What do you mean by "vicinity of the school?"

Q. Near the school that you attend.

A. Yes, sir.

Q. Have you gone in there and bought magazines?

A. They don't sell those kinds of magazines.

Q. Have you bought other magazines?

A. No, sir.

Q. If you know, Lance, is Bellmore in the same school district as Merrick, where you live?

A. Yes, sir.

Q. Do you have any of your schoolmates or friends that go to school with you that live in Bellmore?

A. Yes, sir.

Q. Did you meet those children in Mr. Ginsberg's store?

A. No, sir.

Q. Now, when you went in there for the first time—I will withdraw that. Can you tell us, Lance, when you went into Mr. Ginsberg's store for the first time?

A. Last July.

Q. Up to that time you had never been in this store?

A. No, sir.

[fol. 60] Q. Was there a reason that you can give us for going into this particular store in July?

Mr. Rivers: Objection.

The Court: I do not see how that is germane. Sustain the objection.

Q. Now, before July of 1965, to which store did you go that sells candy, ice cream, newspapers or whatever else—

The Court: I have permitted you—the District Attorney is getting up. I have permitted you a great deal of lititude with this phase of cross-examination. But really, Mr. Ezra, what has this got to do with the issues, whether he goes to some place else to buy ice cream or goes some place else to buy cigarettes or even goes to a package store somewhere to buy liquor? What has it got to do with this case?

Mr. Ezra: Your Honor, I believe it is material with other questions, but if your Honor says I have gone far afield, I will desist.

The Court: I think you have gone far afield with whether he goes to other stores. All we are concerned with is the charge in this case. That is all.

[fol. 61] Mr. Ezra: May I take an exception to your Honor's ruling?

The Court: Sure. If you can tell me the connection, I would be glad to listen to it, but it seems we are going far afield.

Mr. Ezra: I assure your Honor I have other things to do besides this case. I don't think that just prolonging something for no reason—

The Court: (Interposing) Mr. Ezra, let's say that Jake's Department Store sells this magazine or doesn't sell it. What has it got to do with this case?

Mr. Ezra: It has a lot to do with it. I want to know why he picked on this particular store to go into or buy these magazines and pick them up at this particular store.

The Court: Why he did it?

Mr. Ezra: Orginally and the second time.

The Court: Do you want to ask him that?

Mr. Ezra: That's what I'm trying to get to.

The Court: Why did you go into that store?

The Witness: My girl friend lived a block away. I met her during July.

The Court: Then how did you go into the store? What [fol. 62] brought you into the store?

The Witness: I just had to stop there on the way to her house.

The Court: You stopped there on the way to your girl friend's house?

The Witness: Yes.

The Court: You saw the magazines on the rack?

The Witness: Yes, sir.

The Court: Does that answer your question?

Mr. Ezra: Yes.

The Court: Good.

Q. Now, after October 18th or incidentally—I will withdraw that. Now, on October 18, 1965, did you go to this store with your father?

A. Yes, sir.

Q. Your father go into the store with you?

A. No, sir.

Q. Where was your father at that time?

A. Across the street in the car.

Q. After you picked up these magazines you then took these magazines to your father; is that correct?

A. Yes, sir.

Q. Did you buy them for your father?

A. No, sir.

[fol. 63] Q. After you gave them to your father, did you then go home with your father?

A. Yes, sir.

Q. Was there any detective with you at the store that day?

A. No, sir.

Q. Any detective outside of the store on that particular day?

A. No, sir.

Q. Did you speak to a detective about this either that day or the next day?

A. Yes, sir. It was the next day, I think. Two detectives came by.

Q. Two detectives came where?

A. Came to our house.

Q. And if you know, who called those detectives?

A. My mother.

Q. Now, did your mother know anything about your having bought these, other than what you told her?

A. Yes, sir.

Q. How did she know that, sir?

A. She saw me come walking in the house with them. She asked me where I bought them. I told her. She went there one day.

[fol. 64] Q. Now, before this 18th day of October, had you seen magazines of this kind elsewhere?

A. Yes, sir.

Q. Did you purchase them elsewhere before this 18th day of October?

A. Yes, sir.

Q. Where was it that you had purchased them before October 18, 1965?

Mr. Rivers: I object, Your Honor.

The Court: Sustained. I do not see how that is relevant.

Mr. Ezra: No? Your Honor heard this witness testify that he had never bought any magazines elsewhere.

The Court: He said for school purposes he had never bought magazines. He said he bought girly magazines.

Mr. Ezra: He never said it that I heard.

The Court: Do you want to read the entire record?

Mr. Ezra: I don't want to. If your Honor says so, fine.

The Court: My recollection of the testimony is he never bought except on two or three occasions when he had a [fol. 65] newspaper route he didn't buy certain magazines like Reader's Digest, Life, Look, because they were mailed to the house. He did not buy newspapers because his mother brought them home except that he bought them on a couple of occasions and the only magazines that he bought were these girly magazines. The other magazines or books that he needed, he went to the public library for.

Mr. Ezra: I'm sorry. I didn't hear it that way.

The Court: Now, Mr. Corey, did they have these magazines Man to Man, Escapade, did they have them in the public library?

The Witness: No, sir.

Q. Did you ever ask for them in the public library?

A. No, sir.

Q. Did you look all through the library?

A. No, sir.

Q. You don't know whether they had them or not in the library?

Mr. Rivers: Objection.

The Court: I opened the door. Let him go ahead.

A. They could be hiding them somewhere, sure. But, I never saw them.

[fol. 66] Q. Did you ever see any books on architecture of synagogue anywhere in the library?

A. No, but they probably have some.

Q. You never asked for them, did you?

A. No, sir.

Q. You never asked for Sir or Annual or any one of these magazines at the library, did you?

A. No, sir.

Q. Now, when you went to this store with your father, did your father tell you what you were going in there for?

A. Yes, sir.

Q. Did he tell you to go and buy these magazines from this particular store?

A. Not these exact magazines. He said, "Go in there and get some nice magazines."

Q. Get some what?

A. Some juicy magazines.

Q. Does your father read juicy magazines?

Mr. Rivers: I object to what his father does.

A. No, he doesn't read them.

The Court: Now, look, Mr. Corey, just so we can save a lot of time, you bought these kinds of magazines before, didn't you?

[fol. 67] The Witness: Yes, sir.

The Court: As a matter of fact, your mother had seen them, hadn't she?

The Witness: Yes, sir.

The Court: Then, did you have a conversation with your mother and father about these magazines?

The Witness: Yes, sir.

The Court: Now, as a result of a conversation with your mother and father about these magazines, did you arrange to go in and buy these magazines at the store with your father waiting outside?

The Witness: Yes, sir.

The Court: As a matter of fact, your mother or father or somebody called the detective and they came the next day, didn't they?

The Witness: Yes, sir.

The Court: Now, for the purpose of the record, so that we are not playing games here, the Court can understand very well that the parents of this boy, according to his testimony, saw the kind of magazines that they had or he had and that they for some reasons best known to themselves, arranged with the detectives to come the next day after his father went there and get a couple of magazines as evi-

[fol. 68] dence. I can understand that.

Mr. Ezra: Just so we have the record show it.

The Court: The record shows it. There is no entrapment in this State on that. Go ahead.

Q. Did your father also go with you to the places where you had bought magazines of this type and arrange for you to buy magazines there?

Mr. Rivers: Objection.

The Court: Sustained.

Mr. Ezra: Respectfully except.

The Court: Sustained. Go ahead.

Q. Did your mother or your father ever show the other magazines that you had bought from other stores to a detective?

Mr. Rivers: I object, your Honor.
The Court: Sustained.
Mr. Ezra: Respectfully except.

Q. Now, when you went there on October the 18th, you told us that there was no detective that went there with you; is that correct?
A. Yes, sir.
Q. And any initials you may have placed on these magazines were placed after October the 18th; is that correct?
[fol. 69] A. Yes, sir.
Q. Now, the other magazines that you had bought prior to purchasing these magazines from the defendant, as you have testified—

The Court: (Interposing) You mean from Sam's, the defendant?
Mr. Ezra: Yes.
The Court: Say so.
Mr. Ezra: I said the defendant.
The Court: All right. Go ahead. I apologize. You said other magazines that you had bought. It may have been in other stores.
Mr. Ezra: No. I said from the defendant.

Q. These other magazines that you had purchased from places other than Sam's, were they the same magazines that you bought from Sam's?

Mr. Rivers: I am going to object, your Honor. I object on several grounds.
The Court: I do not see what it has anything to do with it. That is why I asked you about your question.
Mr. Rivers: I'm objecting first of all to Counselor's [fol. 70] reference to these magazines. These are now People's Exhibits 2, 3, 4.
The Court: 3, 4 and 5.

Mr. Rivers: I don't think this is competent, whether they had similar importance or similar content and I object, thirdly, I think it's irrelevant and immaterial.

The Court: Objection sustained. We have talked about other stores and other magazines. I rule that it is immaterial. It is not in the issues here.

Mr. Ezra: If the Court will bear with me a minute.

Q. Before this 18th day of October, 1965, did you ever buy Escapade?

A. Probably. I really can't answer that.

Q. Before this 18th day of October, 1965, did you ever buy Mr. Annual?

A. Chances are yes.

Q. Before this 18th day of October, did you ever buy Mr—Man to Man?

A. Yes, sir. I think so.

Q. Did you also buy the other magazines that are involved here, sir?

[fol. 71] A. Yes, sir.

Q. Now, you knew what the prices of these magazines were, did you not?

Mr. Rivers: Your Honor, I object. This has been asked and answered. I think that the question—

The Court: (Interposing) Unless you have some specific point, Mr. Ezra. I see no point in this continued cross-examination about the prices. Now, you have cross-examined him already about the prices. You asked him if when he looked at it did he know what the price was.

Mr. Ezra: Correct.

The Court: Now, the Court is not supposed to close its eyes and ears to practical experience. The Court itself has bought many magazines, Yachting, Boating, which the Court picks up. Common everyday experience. You see the price is $.75. You bring it over to the storekeeper or you buy a paperback book and the storekeeper looks at it and he says $.75. The storekeeper is entitled to know. This is a matter of everyday experience.

Mr. Ezra: Yes.

The Court: What is the point then? Why belabor the question of the price?

[fol. 72] Mr. Ezra: I'm not belaboring, your Honor, it is just so that when I put my defendant on the stand, your Honor will have a background as to how he got the money and what denomination.

The Court: Well, wait for your defendant to get on the stand and testify.

Mr. Ezra: Yes, your Honor, but if I show that this boy knew the prices of these magazines, then it lends more credibility to my case.

The Court: The Court will take judicial notice of the fact that a person buying a magazine with the prices on top almost in every instance, knows what the price is when he walks up to pay for it. Nevertheless they still show it to the proprietor to have the price confirmed. This is a common every day way of handling a purchase of a magazine or book or paperback or anything else that has the price marked on it. At least that is the way the Court has done it for a great many years. If you have done it differently, Mr. Ezra, you can inform me about it.

Mr. Ezra: I intend to, your Honor.

The Court: I said, "If you do it differently." I am not talking about Mr. Ginsberg.

[fol. 73] Mr. Ezra: Yes.

Q. Now, Mr. Corey, you know that this Mr. Ginsberg's place sells many items other than magazines and newspapers; is that correct, sir?

A. Yes, sir.

Q. Did you ever have occasion to buy a piece of chocolate or anything else there?

A. Yes, sir.

Q. Did you show Mr. Ginsberg the piece of chocolate you bought every time you bought it or did you just put money down which constituted the price of that item?

A. I always waited for him to come over so I could show it to him. I held it out in my hand.

Q. That's the way you always did everything?

Mr. Rivers: I object to it.

The Court: Sustained.

Q. Now, when you handed these magazines to your father after you went in and bought them, did your father go back into the store with you?

A. No, sir.

Q. With those magazines?

A. No, sir.

Q. Your father didn't show them to Mr. Ginsberg and say, "Look at what you—

[fol. 74] The Court: He already said he did not go into the store. How could he show it to him?

Mr. Ezra: May I have the exhibits, please? (Handed.)

Q. On either one of the occasions, on the 18th of October or on the 26th of October, 1965, did you have the exact money that represented the price of the two magazines that you bought on each occasion?

A. No, sir.

Q. You always got change, did you?

A. Yes, sir.

Q. Now, coming to the 26th of October, 1965, Mr. Corey, you say that you got to Mr. Ginsberg's store at about 4:00 that afternoon?

A. Yes, sir.

Q. When you went to this store, did your mother accompany you there?

A. She was waiting in the car.

Q. When you say, "She was waiting in the car," you mean some place outside of the car, a little distance from the store?

A. Just about across the street.

Q. And there were other people that went in with you on that day; is that correct?

[fol. 75] A. Yes, sir.

Q. And those two people were detectives?
A. Yes, sir.

Mr. Rivers: Your Honor, I object. I think he is putting words in the witness' mouth. He says other people that were there on that day and then he says those two people. I think it has been brought out here that there were not two people that went in the store with him. One went in the store with him.

The Court: The testimony shows that there was a man at the counter. He was a detective, having either a sandwich or an ice cream soda and after he was in the store, Detective Anderson came in. That is the testimony.

Q. Now, did these detectives come to the store—

The Court: Which detectives?
Mr. Ezra: The two detectives that were with you.
Mr. Rivers: Your Honor, I object to that.
The Court: Let him finish the question. Let's get through with this. Go ahead.

Q. Did they come to the store in your mother's car?
A. No, sir.
[fol. 76] Q. Did they arrange to meet you there?

Mr. Rivers: They?
The Court: Let him answer. He is talking about the detectives.

Q. Did the detectives arrange to meet you and your mother at the store?
A. No, sir.
Q. Had any appointment been made by either you or your mother for detectives to be at the store of Mr. Ginsberg, the defendant, at the same time that you would be there on October 26, 1965?
A. We came in their car.

The Court: You came in the police car?
The Witness: We came in the detective's car.

Q. So that your mother was waiting in the detective's car across the street?

A. Yes.

Q. Now, had you gone to the police station before then or had the detectives come to your house to pick you and your mother up?

A. Came to our house.

Q. So that, who went into this store first of the people that were in the car with you?

A. One of the detectives went in first.

[fol. 77] Q. Do you know his name?

A. No. That's the one I'm not sure of.

Q. Now, after the detective went into the store, who was the next one to go into the store?

A. I went in.

Q. Now, at the time that you went in, was there anybody in this store besides Mr. Ginsberg, the detective and you?

A. No, sir.

Q. Now, where was the detective when you got in to the store?

A. Sitting at the counter.

Q. And does the counter or the seat where the detective was seated, does that face the east side of the store or does it face the magazines which are on the west side of the store?

A. It faces the east side.

Q. Now, did you in any way speak to or acknowledge the presence of the detective in the store when you went in there?

A. No, sir.

Q. When you went to the magazine rack, where was Mr. Ginsberg?

A. Behind the counter.

[fol. 78] Q. Was he serving the detective at the time?

A. I think he had finished serving him.

Q. Did you see him doing any work behind the counter?

A. He was doing something. I'm not sure exactly what it was. He could have been wiping something.

Q. You came in. Did you go directly to the magazine rack?

A. Yes, sir.

Q. And did you pick out magazines?

A. Yes, sir.

Q. Now, when you pick out those magazines, you then paid Mr. Ginsberg for them?

A. Yes, sir.

Q. Do you remember where he was with relation to this counter or to the store itself where you made payment for these magazines.

A. Yes.

Q. Where was that?

A. I could show you right here.

Mr. Ezra: Shall he do that, your Honor?

The Court: Do what?

Mr. Ezra: He wants to show us where he made payment with relation to the counter.

[fol. 79] A. Make believe the wall here would be the counter and gum stand here and candy here—

The Court: (Interposing) Wait a minute. Just a minute. You came into the stand? Where is the entrance to the store?

The Witness: Right where this door is.

The Court: As you come in the door, where is the magazine rack?

The Witness: Right back here.

The Court: Let the record show that the witness has indicated that upon entering the store, the magazine rack was to his left.

Now, we have the magazine rack. Now, where is the counter where the detective is sitting?

The Witness: Make believe this is the counter here.

The Court: Is it almost directly ahead of the door as you come in?

The Witness: Yes, sir.

The Court: Let the record show that the counter was straight ahead and some distance to the right of the magazine rack as you walk in; is that correct?

The Witness: Yes.

[fol. 80] The Court: Now, where is the counter that Mr. Ginsberg was at?

The Witness: He was behind this counter and there is a gum rack here.

The Court: Where do you pay for various items? Where does he stand?

The Witness: There is a gum rack here and candy here and a little opening. He usually stands here.

The Court: Let the record show the witness indicated there is another counter or rack of some kind to the right of the food counter and there is an opening between the two.

The Witness: Yes, sir.

The Court: Is there a cash register located there?

The Witness: No. A gum rack. That is where Mr. Ginsberg usually stands.

The Court: Is that where you paid him for his magazines?

The Witness: Yes, sir.

The Court: All right. Go back to the stand. Mr. Ezra, before we take a lot of time, how is this relevant, how many feet he was from here or there? How is it relevant?

[fol. 81] Mr. Ezra: I can only tell this to your Honor, that on this counter, the detective was some stools in. There are stools at the counter which I mean to bring out, if your Honor will permit me.

The Court: Sure. Go ahead.

Mr. Ezra: At the very edge of the counter, where the witness says there is a gum rack, I will show, both from photographs, even from this witness perhaps, that there is a tall stand where stockings are hanging that are for sale. I do not know what the detective is going to testify to, your Honor, so that I want to show that he could not be in any position to see this boy showing any magazines.

The Court: You are anticipating. That is why I say that this is improper cross-examination. You are trying to show something by cross-examining this witness.

Mr. Ezra: I am trying to show the physical—

The Court: (Interposing) Do it with your own witness. Why prolong his cross-examination. If you are trying to test his memory or credibility, all right. If you are trying [fol. 82] to establish the defendant's case, do it with your own witness.

Now, he has located everything. Now, do you have anything more on this cross-examination? I want to know because if you want to finish and you do not have too much more, I will permit you to finish your cross-examination, but if you are going to continue cross-examination, as is your right, providing you stay within the rules of evidence, then I am going to recess now for lunch.

Mr. Ezra: I believe that your Honor ought to do that, please.

The Court: Ought to do what? Just answer the question. Do you have much more cross-examination?

Mr. Ezra: I do not know how much more. But, I would like to discuss it with my associates.

The Court: All right. We will recess for lunch. Come back at 2:00.

(Whereupon the witness was excused for the luncheon recess.)

AFTERNOON SESSION

[fol. 83] The Court: Are the People ready?

Mr. Rivers: Yes.

Mr. Ezra: The defense is ready. Your Honor, may we approach the Bench for a moment, with Mr. Friedman, one of my associates?

The Court: All right. Come on up.

(Off the record discussion.)

RICHARD LANCE COREY, a witness on behalf of the People, having previously been sworn, resumed the stand and testified as follows:

Cross examination.

By Mr. Ezra:

Q. Mr. Corey, I show you this photograph and ask you whether it accurately represents the counter in that store and the space between the counter and the front of the store where you say you paid Mr. Ginsberg?

Mr. Rivers: Objection. I object to the form of the question. I think it's improper. The witness is being asked several questions with regard to that particular photograph.

Mr. Ezra: I will withdraw it if you want me to.

Q. I ask you, Mr. Corey, to look at that photograph and tell us what it represents?

[fol. 83(a)] A. The candy store and the counter.

Q. In addition to the counter, does it show anything else?

A. Couple of people sitting down and a space.

Q. Does it show the place where you pointed out to us where you stood up here as being the place where you made payment to Mr. Ginsberg?

A. Yes, sir.

Mr. Ezra: I offer it, your Honor.

The Court: No. Not yet. Mark down there with an "X" where you stood when you made the payment on that picture. All right. Now you can offer it. Show it to the People. (Handed.)

Mr. Rivers: Your Honor, may I have a voir dire as to this?

The Court: Yes.

Voir Dire.

By Mr. Rivers:

Q. Richard, the counter here shows a space between the gum section and the actual lunch counter where the service takes place; is that right?

A. Yes, sir.

The Court: Show him the picture. (Handed.)

A. Yes, sir.

Q. Now, there is a certain width to the lunch counter; [fol. 84] is that right?

A. Yes.

Q. Were you standing within that area or were you standing parallel to the outside of the lunch counter?

A. Just about—I'd say right off the corner here.

Q. You weren't standing by the "X" that you put there but the outside of that area?

A. Yes, sir. Right here.

Mr. Rivers: May we have that corrected?

The Court: Put down with the initials "R" "C" where you were standing at the time that you paid, where you were.

The Witness: (Indicating)

The Court: All right. Show it to the attorney for the defendant. (Handed) Now, do you want to offer it?

Mr. Ezra: Yes, your Honor.

The Court: All right.

Mr. Rivers: No objections.

The Court: Receive it in evidence as Defendant's Exhibit A.

(Whereupon the picture was received and marked De- [fol. 85] fendant's Exhibit A in evidence.)

Cross examination (continued).

Q. Now, Mr. Corey—

The Court: (Interposing) Just a minute, please. What does the "X" represent on here?

The Witness: That's just about where Sam stood.

The Court: That is where Sam stood?

The Witness: Yes.

The Court: And the "R" "C" is where you stood?

A. The Witness: Just about.

The Court: Go ahead.

Q. I show you this photograph and ask you whether that represents or I ask you what it represents?

A. Looking out from behind the counter.

Q. Does it show the magazine rack that you say you took these magazines from?

A. Yes, sir.

Mr. Ezra: I offer that, your Honor.

Mr. Rivers: May I see it? (Handed) May I have a voir dire with respect to this?

The Court: Go ahead.

Voir Dire.

By Mr. Rivers:

[fol. 86] Q. Richard, you stated that you have visited this store several times prior to October 18, 1965; is that right?

A. Yes, sir.

Q. How many times would you say you visited this store?

A. Altogether, about 50 times.

Q. And during the course of that 50 times, have you ever taken a position behind the counter in relation to the magazine rack of the store?

A. No, sir.

The Court: So that as a matter of fact, you cannot say, with any degree of definiteness, whether or not this is in fact a representation of the area behind counter, can you?

The Witness: Well, it would be just like standing in front of the counter.

By Mr. Rivers (continuing).

Q. I'm asking you a question. Just respond to my question. Can you see that this is in fact a photograph taken from behind the counter in the store in which you say you visited 50 times?

A. Yes, sir.

Q. You can say this was taken upon this vantage point?

[fol. 87] A. Yes, sir.

Q. Based upon what Richard—

A. (Interposing). I have been in the store so many times, I know where everything is placed. So, I place myself behind there.

Q. But in fact you have never been there?

A. No.

Q. I'm asking can you say definitely if this was taken from behind the counter?

Mr. Ezra: I object to it because there was no evidence whether it was taken from behind the counter.

The Court: The question is what does it represent. Read the question that Mr. Rivers put to the witness.

(Pertinent question read back.)

The Court: All he is asking is if this picture shows the magazine rack, that is all. You offer it only as a picture that shows the magazine rack?

Mr. Ezra: Yes, sir.

Mr. Rivers: May I ask one further question?

The Court: Go ahead.

Q. Have you ever seen this magazine rack from this [fol. 88] angle before?

A. Yes, sir.

The Court: Receive it in evidence. Defendant's Exhibit B.

(Whereupon the picture was received and marked Defendant's Exhibit B in evidence.)

Cross examination (continued).

Q. Richard, before you went to the defendant's store with your father, after the 18th of October, had you spoken to any detectives at that time?

A. Could you please repeat that?

Q. Yes. After you bought the magazines, you say you went back to the store with your father; is that correct?

A. I had bought magazines there before and my father asked me to go back there again.

Q. When you went back there with your father, had you already spoken to detectives or hadn't you?

A. I believe my parents had.

Mr. Ezra: That is all, your Honor.

The Court: All right. Before we go ahead with the redirect—Off the record.

(After calendar call the trial is continued.)

[fol. 89] Redirect examination.

By Mr. Rivers:

Q. Richard, on cross-examination, you were asked by Mr. Ezra whether you had purchased the magazine Escapade, Sir, Mr. Annual and Man to Man before and you answered you had done this before the 18th of October; is that right?

A. Yes, sir.

Q. Had you made these purchases of these magazines at the location of Sam's luncheonette at 1507 Bellmore Avenue, Bellmore?

A. Yes.

Q. Now, prior to the 18th day of October, did you visit the luncheonette there?

A. Yes, sir.

Q. Did you have a conversation—withdrawn. Did you have a conversation with the proprietor, Mr. Ginsberg?

A. Yes, sir.

Q. Can you tell the Court, as near as you can remember, what or how long that was prior to the 18th of October?

Mr. Ezra: I object, if the Court please, unless we have a time and place.

[fol. 90] The Court: He is asking him the time now.

Mr. Ezra: I'm sorry.

The Court: He is asking how long before the 18th did it take place.

A. About one week.

Q. Do you recall at all the day of the week it was?

A. It was the 11th or 12th.

Q. At that time you had a conversation with Mr. Ginsberg?

A. Yes, sir.

Q. Where did the conversation take place?

A. He was behind his counter and I was sitting on one of the stools.

Q. Were you being served something then?

A. I was having a vanilla soda.

Q. Can you tell the Court what you said to Mr. Ginsberg and what Mr. Ginsberg said to you at that time?

Mr. Ezra: I object to it, if the Court please. It is not within the time or period embraced within the complaint.

The Court: I will take it subject to connection.

Mr. Rivers: Counsel opened the door.

The Court: If it is going to be what I think it is, it may [fol. 91] be relevant.

Q. Tell us exactly what your conversation was?

A. About a day or two before this day my mother had been in there. Mr. Ginsberg—his manner of talking to her got me mad.

Q. Let's not talk about that.

The Court: Strike out his way of talking to your mother. Your mother had been in there?

The Witness: Yes, sir.

The Court: You had a conversation with your mother thereafter?

The Witness: Yes, sir.

The Court: Now, on this day then, you had a conversation with Ginsberg, right?

The Witness: Yes, sir.

The Court: Tell us what the conversation was?

The Witness: I visited him to take the magazines behind the rack or at least put them behind the counter. At least this way he wouldn't get in trouble with the law. He started telling me it wasn't my business. He started telling me a story about Adam and Eve. My girl friend was sitting right next to me when he was telling me this.

Q. What is your girl friend's name?

[fol. 92] A. Lucy Rondazzo.

Q. Where does she live?

A. Randell Street, a block away from the store.

Q. At the time of the conversation, when you were talking to Mr. Ginsberg, was there any reference to your age?

A. I told him I'm not exactly what I said. But, I know I said something about my age being 16 because my mother was there a couple of days before.

Mr. Ezra: Your Honor, I ask all this be stricken out. He is not sure.

The Court: This is important. This is relevant.

Q. Can you tell us whether or not there was any reference by you or him as to the age of people coming in the store?

Mr. Ezra: I object to the question. It is leading.

The Court: That is leading.

Q. I withdraw it. Tell us the entire conversation, to the best of your recollection, that you had with Mr. Ginsberg, that you had at that time, without leaving anything out?

A. I don't know the exact words, but I did talk about [fol. 93] my age and my little brother being in there. I didn't want him to get in any trouble. I thought it best if he put the magazines behind the counter, because I knew he would get in trouble if he sold magazines like that to somebody my age. Then he started telling about Adam and Eve.

Q. What did he say about Adam and Eve?

A. I don't remember the exact words. I wasn't listening. It was a lot of bologna.

Mr. Rivers: Strike it.

The Court: All right. Strike it out.

Q. Tell us as best as you can what he said to you?

Mr. Ezra: Your Honor, he has already answered.

The Court: Suppose you give him a chance. I am trying to find out what he said to him.

Now look, Mr. Corey, you were there. You had a conversation with him. Do you remember what you said to him and what he said to you?

The Witness: I remember advising him about the magazines behind the counter.

The Court: What else do you remember?

The Witness: Telling him I was 16 and talking to him about my little brother who was in there.

The Court: Did you tell him how old your little brother [fol. 94] was?

The Witness: He was only six.

The Court: Was he there with you at the time?

The Witness: No.

Q. What did he say to you?

A. He told me it was really none of my business. It was only a natural thing to look at these magazines.

Mr. Ezra: I object to that and ask that it be stricken out.

The Court: This is what he told him.

Mr. Ezra: He said it's a natural thing for him to look.

The Court: Mr. Ezra, please. This natural thing business, is this your idea or did somebody say it to you?

The Witness: Nobody said it. My father gave me a lecture about that five years ago.

The Court: All right. Strike it all out.

Q. Tell us what Mr. Ginsberg said only on this occasion?

Mr. Ezra: That's already been answered three times.

The Court: Mr. Ezra, will you please stop.

A. It was really none of my business.

[fol. 95] The Court: He told you it was none of your business; is that right?

The Witness: Yes, sir.

The Court: What else did he tell you, if anything; do you remember?

The Witness: He mentioned Adam and Eve. That's all I remember.

The Court: He mentioned something about Adam and Eve?

The Witness: Yes, sir.

The Court: Do you know what he mentioned about Adam and Eve?

The Witness: No, sir, I don't remember that.

The Court: What else did he say? If you do not remember, it is all right, too.

The Witness: I really can't remember it all.

The Court: All right. That is it.

Q. Now, you were asked on cross-examination by Mr. Ezra, defense counsel, did your mother know anything

about that purchase, other than what she was told by you. Do you remember that question?

A. No, sir.

Q. To that question, you answered, "No."

[fol. 96] Mr. Ezra: I object, your Honor. He says he does not remember the question and the Assistant D. A. is giving the answer.

The Court: All right. Sustained.

Q. Let me ask you this, Richard. Did your mother know anything about the purchase of these magazines?

A. Yes, sir.

The Court: What a minute. He has not finished the question, Mr. Corey.

Q. Subsequent to the 18th day of October, other than what you told her—

The Court: No. I am going to sustain the objection. That calls for an operation of his mind, what his mother knew.

You bought the magazines before the 18th, right?

The Witness: Yes, sir.

The Court: You told your mother about it?

The Witness: She found them.

The Court: She found them?

The Witness: Yes.

The Court: She found them and you had a conversation with her?

[fol. 97] The Witness: Yes, sir.

The Court: As a result of that conversation, you went there on the 18th with your father; is that correct?

The Witness: Yes, sir.

Q. Let me ask you this. Prior to your going to the store with your father, did your mother do anything with respect to the sale of these magazines?

A. Yes, sir. She went down there and talked to Sam.

Q. She had a conversation with the proprietor; is that right?

A. Yes, sir.

Q. You do not know what the conversation was other than what she told you; is that correct?

A. Yes.

The Court: This is before the 18th?

The Witness: Yes.

Mr. Rivers: That's all. Nothing further.

The Court: Mr. Ezra?

Mr. Ezra: Your Honor, I move to strike out all of the testimony of this witness on the redirect on the ground that the only thing that the complainant speaks of is the occasion of the purchase on the 18th of the month and nothing before then.

[fol. 98] The Court: Look, Mr. Ezra, the proof of age here is an important part of the case. Now somewhere, somehow, I have been waiting for the District Attorney to show that the defendant had an awareness or a ground to believe that this boy was under 17 years of age.

Now, he has a right to prove that and he has proven that he has attempted to prove it by this boy's testimony that he had an actual conversation with the defendant and he actually told the defendant that he was only 16 years of age and this is very important and this is very relevant.

Mr. Ezra: Is it a proper redirect? I didn't ask him anything about age, your Honor. Is it a proper redirect?

The Court: The Court has, under the Code of Criminal Procedure, power to allow evidence to come in that is relevant and germane into the People's case or to your case. I can let it in after they rest, under the Code.

Mr. Ezra: May I ask the defendant one or two questions?

The Court: Go ahead, on the redirect.

Mr. Rivers: He is not the defendant.

Mr. Ezra: The witness. Excuse me.

[fol. 99] The Court: On the redirect, Mr. Ezra.

Mr. Ezra: Yes.

Recross examination.

By Mr. Ezra:

Q. Now, when you told Mr. Ginsberg to take these things out of the counter and put them behind or to take them off the rack and put them behind the counter, had you looked into the law with respect to the sale of magazines?

A. No, sir.

Q. Did you know that it was against the law to sell magazines of this kind to a minor?

Mr. Rivers: I object, your Honor.

The Court: Let him answer it.

A. I had an idea that there was a law about being a certain age, but I wasn't sure what age.

Q. With whom had you discussed that law, if at all?

Mr. Rivers: Objection.

The Court: I will let him answer it. Overruled.

A. Other store owners, because sometimes they would ask me how old I was.

Q. So that you had attempted to purchase or you did purchase magazines of this kind from other store owners?

[fol. 100] A. Yes.

Q. You discussed this with them?

A. No. They just asked me how old I was.

Mr. Ezra: I have no further questions.

Mr. Rivers: Nothing further.

The Court: Step down.

(Whereupon the witness was excused.)

The Court: Do you want this witness to remain in the courtroom or stay outside the courtroom?

Mr. Ezra: I had understood that all witnesses were going to be excluded.

The Court: All right. He can stay outside.

Mr. Rivers: Can he leave the courthouse?

The Court: If you want him for rebuttal, he should keep himself available.

Mr. Rivers: The witness has a track meet. He would like to leave.

The Court: Suppose the witness tells you where his track meet is.

Mr. Rivers: Is it all right if he leaves, Mr. Ezra?

Mr. Ezra: Sure.

Mr. Rivers: Mrs. Mary Corey.

[fol. 101] MARY COREY, a witness on behalf of the People, residing at 2274 Woodbine Avenue, Merrick, New York, after first being duly sworn, testified as follows:

Direct examination.

By Mr. Rivers:

Q. Mrs. Corey, do you have a son by the name of Richard Lance Corey?

A. I do.

Q. When was he born?

A. September 11, 1949.

Q. On October 18, 1965 how old was he?

A. He was 16 years, one month, some days.

Q. On October 26, 1965, how old was he?

A. 16 years, one month and some days.

Q. And today, how old was he?

A. He is 16 years, seven month and five days—six days.

Q. Now, Mrs. Corey, I call your attention to the date—withdrawn. Did you have occasion in October, 1965 to visit the luncheonette, 1707 Bellmore Avenue, Bellmore?

A. I did.

Q. Were you in the company of someone else on that visit?

A. My young son who was just six.

[fol. 102] Q. On that occasion, did you have occasion to have a conversation with one Sam Ginsberg?

A. I did.

Q. Do you see Sam Ginsberg in the courtroom?

A. I do.

Q. Will you indicate him for the Court?

A. He is sitting back there. Gray hair, horn rimmed glasses.

Mr. Rivers: Let the record indicate the witness has pointed to the defendant.

The Court: Let the record so indicate.

Q. On that occasion when you had this conversation with Mr. Ginsberg, was his business open?

A. It was.

Q. On that occasion, did you have occasion to observe the contents of the store?

A. I absolutely did.

Q. Did you have occasion to specifically observe the magazine stand?

A. I absolutely did.

Q. Did you remove the contents of the magazine stand?

A. I lifted them off the side and leafed through. As you walk in, the left hand side of the store, there was a long table and plus racks above it. These magazines Sir, Mr. [fol. 103] Annual, etc., etc., were in display with Better Homes And Gardens, Good Housekeeping, etc. Just to the right of those racks were other racks with comic books there. Shall I go on?

Q. Yes.

A. I stood there surveying this whole bit for several minutes and this woman approached me. She said, "Can I help you?"

Mr. Ezra: I object, if the Court please. What woman and what she said is not material or binding on the defendant and should be stricken out.

Mr. Rivers: May I ask one question before you decide?

Q. Was Mr. Ginsberg in the proximity of where she was when the woman approached her?

A. Mr. Ginsberg was behind the counter.

The Court: How far was everybody from each other?

The Witness: The store is maybe 30 feet deep. I was approximately seven feet inside the front door. Mr. Ginsberg was a total of possibly 10 feet to 12 feet from me.

The Court: Where was the woman?

The Witness: She was in the front part of the store, [fol. 104] apparently, I don't know, taking care of the cash register. She was an employee, I presumed. She asked me, could she help me. I said scarcastically, I said, "I want to compliment you on your wide range of pornography."

The Court: Stop there. Where was Mr. Ginsberg then?

The Witness: He was busy at the counter.

The Court: Strike it out.

Q. Had you approached Mr. Ginsberg?

A. I approached Mr. Ginsberg. But, I did not hold the magazines in my hand at the time. I said approximately the same thing to Mr. Ginsberg.

Q. What did you say?

A. I said, "I want to compliment you on your wide range of pornography." He wanted to know who I was. I said, "I am Lance Corey's mother." Lance is what we call him. It's Richard Lance Corey. Lance asked him if he could work in this store.

Mr. Ezra: I object, if the Court please.

Mr. Rivers: No objection here. She said, "I am Lance Corey's mother," and Lance has asked me—

The Court: Let's find out. You told Mr. Ginsberg, "I am Lance Corey's mother." What is the next thing you [fol. 105] said to Mr. Ginsberg?

The Witness: Lance has asked me—

The Court: You told this to Mr. Ginsberg? This is part of the conversation?

The Witness: Lance has asked me if he could work in this stationery store and I told Lance that before I would permit him to work in any stationery store, that I would like to see it. I said that after having looked this place over, I would not have him work here. I said, "You sold my son magazines when he was still 15 years old." "He just turned 16 a few weeks ago," which established his age and then this woman who I still presume is an employee, started berating me, telling me that—

The Court: (Interposing) Stop right there. Was Mr. Ginsberg standing right there?

The Witness: Yes. Absolutely.

The Court: Go ahead.

The Witness: Berating me, claiming that if my son were brought up properly, he would not be looking for these magazines and I said, "You have these out in the open. You would probably even sell them to my child, my six year old child here with me," and Mr. Ginsberg said it has nothing to do with me. This is not exactly verbatim. I can't [fol. 106] remember the identical words, but it is no concern of mine how old anyone is, if he wants to buy a magazine, he may purchase it.

By Mr. Rivers (continuing):

Q. Now, was this the entire conversation on that occasion?

A. The woman was screaming at me and I was very excited, claiming that I didn't bring my son up properly, otherwise he wouldn't be looking for these magazines and I left and came home.

Mr. Ezra: Your Honor, may I move that it be stricken out? These are not statements made by the defendant. These are statements made by somebody else.

The Court: Right in the defendant's presence.

Mr. Ezra: It still does not matter, your Honor. It does not bind this defendant.

The Court: I will take it.

Mr. Ezra: I respectfully except, your Honor.

The Witness: The defendant did say—

The Court: (Interposing) Never mind, Mrs. Corey. You just answer questions.

Q. You left the store; is that right?

A. That's right.

Q. Did you have a conversation that day with someone [fol. 107] else with regard to this?

A. I called the 7th Precinct.

Q. Don't tell me what the conversation was. As a result of that conversation, did you have occasion to go back to that store?

A. Not me personally. I have never been near the store again.

Q. Did there come a time when these magazines or some magazines were again in your presence?

A. That came about because I wrote to the District Attorney's office.

Q. No, no. You say you didn't go back to the store yourself; is that right?

A. I personally did not. My husband did.

Q. Subsequent to that time, subsequent to your husband going to the store—

Mr. Ezra: (Interposing) Your Honor, this is assuming a state of facts not in evidence. She said, "My husband did." She wasn't with him. She would not know whether he went to the store or not. I move that it be stricken out.

The Court: All right.

Q. There was an occasion on the 18th of October when the two magazines were again in your physical presence, is that not so?

[fol. 108] A. On the 18th of October. The dates are confusing to me because I don't know exactly which dates I went in the store.

The Court: Let's not get it complicated. Mrs. Corey, you went into the store and you had a conversation with Mr. Ginsberg, right?

The Witness: Yes.

The Court: Sometime after that conversation, did your son come home with any magazines?

The Witness: Yes.

The Court: How many magazines did he come home with?

The Witness: Two.

The Court: At the time he came home with the two magazines, was anybody with him?

The Witness: My husband was with him.

The Court: All right. That is all. Why make it hard.

By Mr. Rivers (continuing).

Q. Now, on the 26th day of October, did you visit the store again?

A. I believe that was the date I was outside in a car. I did not go in the store myself.

Q. Did magazines again come into your presence as a result of that?

[fol. 109] A. Yes.

Q. Where were you situated with respect to the entrance-way of this store 1507?

A. Approximately across the street.

Q. Were you able to see the entrance doorway?

A. I could see the entrance to the doorway.

Q. At the time you arrived at the store were you with someone else?

A. Yes.

Q. Who were you with?

A. Detective Sergeant Groh and Detective Anderson.

Q. Did there come a time when Detective Groh and Detective Anderson left the car?

A. Yes.

Q. Where did they go?

A. Into the store. Into the stationery store.

Q. Was anyone else with you other than Detective Groh and Detective Anderson?

A. My son Richard Lance.

Q. Did there come a time when he left also?

A. Yes.

Q. Where did he go?

A. Into the store.

Q. Now, did there come a time when your son came out of the store?

[fol. 110] A. Yes.

Q. Did he have anything with him?

A. Yes.

Q. What did he have?

A. He had magazines. I can't recall exactly whether there were two or three magazines at the time.

Q. What happened to these magazines that he had?

A. We turned them over to Detective Sergeant Groh and Detective Anderson.

Q. Now, with respect to these magazines, was anything done with them in your presence prior to their being turned over?

A. We initialed them with the date.

Q. I show you People's Exhibit 4 and 5, I believe. (Handed.) I ask you whether or not you have seen these before?

A. Yes.

Q. Where have you seen them?

A. These are, I believe, the first two that Lance bought.

Q. Can I see the exhibits? Maybe we have them mixed up. No. She is right. Where did you see them before, Mrs. Corey?

A. I don't know whether these are the first two he [fol. 111] bought or the second two that he bought with Detective Sergeant Groh and Detective Anderson because of the dates. I'm trying to remember the exact date.

The Court: Did he initial them in your presence?

The Witness: Yes. Both times.

The Court: Do you recognize any of those initials?

The Witness: Yes. Richard Lance Corey. Richard Corey.

Mr. Ezra: I move to strike out the testimony of this witness.

The Court: What testimony?

Mr. Ezra: The testimony that he bought these magazines. She was not there.

The Court: She didn't say that.

Mr. Ezra: Certainly she did.

The Court: She did not. She said he came out of the store with two magazines in his hand. She did not say anything about buying them. All right. Stop right there. Read the record as to her testimony when he went in the store with the detective.

(Record read back by Reporter.)

The Court: Strike out the part that Lance bought.

[fol. 112] Mr. Rivers: I have no further questions.

The Court: You may examine, Mr. Ezra.

Cross examination.

By Mr. Ezra:

Q. Now, Mrs. Corey, on the day that you say that you went to this defendant's store and you had a conversation with him, did you ever meet Mrs. Ginsberg before that day?

A. Never.

Q. Did you come into the store with your son Richard Lance?

A. No.

Q. When you spoke to the defendant about your son Richard Lance, did the defendant say to you, "I don't even know who you are talking about?"

A. No.

Q. Did he ask you, "Who is your son?"

A. He knew my son by the name Lance.

Q. Did you ask him, "You know my son Lance. Why did you sell him these?" Is that what you said to him?

A. I did not ask him, "Why." I said, "You sold my son Lance these filthy magazines when he was still 15 years old. He just turned 16 a few weeks ago."

Q. Now, other than what your son Lance had told you [fol. 113] about these magazines, you didn't know where he bought them, did you?

A. I had found several magazines in Lance's closet in August.

Mr. Ezra: Your Honor—

The Court: It may be an answer. If it is not an answer. I will strike it out.

A. In August. I looked through them, in my opinion filthy magazines, which I burned.

Mr. Ezra: I move it be stricken out.

The Court: Strike out the answer so far. Read the question back, Mr. Reporter.

(Question read back by the Reporter.)

A. After I destroyed these magazines, I asked Lance where he had purchased them and he told me it was—

The Court: Other than that, do you know where he bought them, other than what Lance told you?

The Witness: No.

Q. Now, are you connected with any organization or league that is opposed to the sale of magazines of the kind that we have here?

A. I am not.

Mr. Rivers: Objection.

The Court: I will let her answer. Now, look, when you see the gentleman get up, either one of them and they say, [fol. 114] "I object," that is the time for you to maintain a discreet silence.

Now, what was your answer? You do not belong to any such league?

The Witness: That's right.

Q. You were in the automobile across the street from this store and your son Lance did come out with two magazines or three. You said you didn't know how many; is that correct?

A. Yes.

Q. Now, this was the police officer's car that you were in?

A. Yes.

Q. Now, when your son came out, did the detectives come with him?

A. They followed him by approximately a minute or two minutes.

Q. Immediately after that, did they also enter the automobile?

A. Oh, yes.

Q. And was this initialing that you told us about was in the automobile itself?

A. Yes.

Q. All right. Now, did the detectives then go and arrest this defendant?

[fol. 115] Mr. Rivers: I object, your Honor. She did not testify as to that. There is no indication here that she witnessed anything besides—

The Court: (Interposing) It is still the same situation of proving the defendant's case. Mr. Ezra, I am going to ask you to confine yourself in cross-examination to matters to which the witness has testified or as to those matters where you are attacking credibility. Are you attacking credibility now?

Mr. Ezra: No, your Honor.

Mr. Rivers: I object then.

The Court: Sustained.

Mr. Ezra: I believe, unless I am wrong, I am entitled to find out what happened at that time. I asked the question of whether in her presence the arrest was made.

Mr. Rivers: I think that counsel should ask what happened at that time or—

The Court: (Interposing) Let's not take up a lot of time.

Was an arrest made in your presence?
The Witness: No.

By Mr. Ezra (continuing):

Q. Do you know how long after this incident of the [fol. 116-117] magazines and the initialing and an arrest was made?

Mr. Rivers: I object.
The Court: Let her answer. Do you know?
The Witness: I believe it was the next day.

Q. Did you take any magazines off the rack on that day that you were in there?
A. Just lifted them off. I did not purchase any.
Q. You didn't take any?
A. No.

The Court: What do you mean by that, Counselor, take them out of the store?
Mr. Ezra: Yes.

A. No.
Q. You didn't?
A. No.

Mr. Ezra: Now, off the record. May I ask the Court—I don't want to go into things that your Honor may find objectionable because I was going to ask the young lad about other magazines and so on. Can I ask it of this witness?
The Court: What is the point?
Mr. Ezra: To show that other magazines that are not what she may describe as filthy or pornographic.
[fol. 118] The Court: The question of whether or not it is filthy or pornographic is not the issue here. If you want, I will ask her some questions. If you want to ask some questions as to whether or not these magazines are offensive to her, I will let you ask her those questions.
Mr. Ezra: I do not think it would matter whether they are or not, your Honor, under the statute, because under the statute, it is on a national level, it says.

The Court: This is all on the record. Let's not have anything off the record. Everything goes on the record. You go ask your questions. I will rule on them as you go along.

By Mr. Ezra (continuing):

Q. Now, do you have a subscription to Reader's Digest?
A. Yes.
Q. Do you have a subscription to Time Magazine?
A. No.
Q. Do you purchase Time Magazine?
A. No.
Q. Do you permit your son Lance to read Reader's Digest?
A. Yes.
[fol. 119] Q. Do you permit your son Lance to read the New York Times?
A. We don't purchase the New York Times.
Q. Now, I show you—I withdraw that. Do you still have a subscription to Reader's Digest?
A. Yes.
Q. Did you have that subscription in December of 1965?
A. Yes.
Q. I show you page 200 of Reader's Digest of December, 1965 and ask you whether that offends your taste?

Mr. Rivers: Your Honor, I object, on the grounds that whether or not it offends the taste of this witness is not within the keeping—

The Court: (Interposing) If what offends the taste of the witness, some picture he has in Reader's Digest?

Mr. Rivers: What possible part of the Digest can he approach or make out with regard to this charge. It has nothing to do with it. What is harmful to minors is spelled out under subdivision (f) of the statute. This can be found by the Court. Whether this witness finds it harmful to her son or not is of no importance in this matter. The [fol. 120] Legislature has laid out what is harmful or not

harmful. It has what nudity means and what sexual conduct means. It has been laid out by the Legislature and not whether or not it is harmful to the taste of this witness.

The Court: What is your point, Mr. Ezra? Are you going to try and tell me that because some pictures are hanging in the Louvre or Michelangelo painted on the ceiling in the Vatican or some other place that shows nudes, that therefore, any nudes are not offensive?

Mr. Ezra: No, but I will ask the Court at the proper time to take judicial notice of the fact that there are numerous works of art of nudes and that the statute does not differentiate between—

The Court: (Interposing) The statute reads and I can read and you can read and we are not going to get off on a long harangue.

Harmful to minors means, "One. Predominantly appeals to the prurient, shameful or morbid interest of minors," and, "Two. Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors," and the third test of "harmful to minors," is, "utterly without redeeming social [fol. 121] importance to minors."

Now, that takes into effect the item Three, "is without redeeming social importance to minors," takes in the clarification of what is art. Pictures that are painted by recognized artists are of the type which we have been discussing. Whether they have been painted by Rubens, Michelangelo or by Goodfriend, who painted—I forget his name. France Hall, who paints very busty women. Now, since these things might very well come within the definition of art and of social importance throughout the century, certainly the pictures that are painted on the Sistine Chapel, which shows a great many nudes, if I remember correctly, is a matter of social importance.

Now, the query here is whether these works of art like Escapade and Man to Man and this picture of "Chee Chee" on the inside of Escapade is a work of art and a matter of social importance to minors and whether it is,

in the opinion of the adult community as a whole, a matter that is distasteful and patently distasteful?

Mr. Rivers: This is a fact for the Judge, the trier of the facts—

[fol. 122] The Court: (Continuing) That is why I want to ask her if these pictures are distasteful in these magazines. I will let you do it. But, we are not going to get into this art form business. I do not think it is an issue here.

Mr. Ezra: Are these nudes or aren't they, your Honor. That is the important thing.

The Court: These?

Mr. Ezra: These too.

The Court: What does the Reader's Digest have to do with this? I grant you that if you go into the museum, we will take judicial notice of it and save a lot of time—If you go into the Metropolitan Museum of Art in New York, The Museum of Modern Art; if you go into the Louvre; if you go into the art museum in any land; if you go into other places, the Art Show that was run by the Five Towns Museum and Art Foundation of which my wife was chairman, you will find a great many nudes.

Mr. Ezra: Where is the distinction?

The Court: This is something that I am going to make up my mind about, where the distinction is. If you want to contend that on page two of Exhibit 4, the picture of "Chee [fol. 123] Chee," is a work of art, then, I will listen to your argument, showing me that this is a work of Art or if you will, if you feel that this magazine with this picture of "Chee Chee" or a few more pictures, are suitable material for boys and girls under 17 years of age, then I will listen to your arguments on it.

Mr. Ezra: Yes, your Honor. The only way I can do that is by the section itself, which is involved here, where whether there is anything in the magazine, which must be taken as a whole, if it has anything of social importance or significance, that it is not prurient.

The Court: I will listen to your arguments on it.

Mr. Ezra: The Courts have so held, in all of the cases which are before the Court—

The Court: Chinman has not held yet.

Mr. Rivers: There have been no cases on that statute. This is a new statute.

The Court: Let's not get off the subject. We are now on a question of cross-examination. Now, you can cross-examine this witness with respect to the testimony she gave. You can cross-examine her to attack her credibility and I [fol. 124] said to you if you want to cross-examine her and ask her questions as to what she thinks of this material in Escapade and Man to Man as to her opinion as to whether it is suitable material for minors, I will let you do it.

Mr. Ezra: Your Honor, I won't go into the question of these things.

By Mr. Ezra (continuing):

Q. Does your son or your husband, Mrs. Corey, have interests in the line of photography?

A. My husband is a very amateur photographer.

The Court: You do not mean "very amateur." He is an amateur photographer.

The Witness: Right.

Q. Your husband has cameras at home?

A. Certainly.

Q. Do you have subscriptions to any photography magazines?

A. No.

Q. Does your husband or you purchase photography magazines?

A. No.

Q. Have you seen any photography magazines?

A. Yes.

[fol. 125] Q. Have you seen photographs of nudes in the photography magazines?

A. Yes.

The Court: Let him examine her. Go ahead.

Q. Those magazines are sold in the type of store that Mr. Ginsberg operates, are they not?

A. I don't know. I don't look for them specifically. I presume they are, but so far as knowing, I don't know.

Q. Now, I recall to you your testimony that you went into the store, that you looked over the magazine rack. You told us where certain types of magazines were and the magazines were comics and so on?

A. Yes.

Q. So you noticed those kinds?

A. Yes.

Q. Did you also notice "Track and Meet"?

A. That specific one? No.

Q. Did you notice any magazines that dealt with sports?

A. No. They were there, but I don't remember the titled ones.

Q. But were there all types of magazines on this particular rack?

A. To my recollection, they were all mixed in with each [fol. 126] other.

Q. About how many different titles would you say there were on this rack?

A. That would be beyond my imagination. It could be 50. It could be a hundred.

Q. From what your son told you, he went to these magazines; is that correct?

A. My son purchased these magazines.

Mr. Ezra: May I move that that be stricken out as not being responsive and is calling for a conclusion?

Mr. Rivers: It was responsive, your Honor.

The Court: What is the question? (Question read back.)

The Court: You asked her.

Mr. Ezra: I did not ask her whether he purchased them, your Honor.

The Court: You asked her from what your son told you he went to these magazines?

Mr. Ezra: Yes.

The Court: Strike out the word "purchase."

Mr. Ezra: I have no further questions.

The Court: Just so that we understand each other, Mr. Ezra, I call your attention to page 26 and 27 of People's [fol. 127] Exhibit 4 in evidence and ask you whether the photographs set forth on those two pages, is it your contention that they are on art form and that they have social importance?

Mr. Ezra: If your Honor is asking me, this is a news item which shows how life is and it depicts life as it is conducted where ever this story is about, and it can very well be a deterent.

The Court: Is it your contention that those pictures—I just want to be sure of what your contentions are—that these pictures are socially important to minors under 17 years of age.

Mr. Ezra: I make no such contention, your Honor. I say that this is a news item. These pictures even have appeared in newspaper periodicals.

The Court: I ask you a specific question. Do you feel that these pictures are socially important to minors?

Mr. Ezra: This might very well be socially important to minors in order to show them to stay away from places like this, your Honor and besides that, a reading of the statute will show that the magazine must be taken as a whole. That is the statute.

[fol. 128] The Court: I have read the statute, sir.

Mr. Ezra: Your Honor, in the case of subsequent—

The Court: (Interposing) We are in the middle of trial. Let's not prolong it. I just wanted to ask you a question on a certain thing. I will let you argue it if you want to argue the point, but I have read the statute. I have read the subdivisions. I know what it provides and the purpose of the statute is to get away from these sophisticated arguments about art forms and art, so forth and so on. The

purpose of the statute is to expressly prohibit the sale, "knowingly sell to minors pictures of nude figures." It does not go into the question of Michelangelo, does it or the fellow down in Greenwich Village, does it? It is an express statute.

Mr. Ezra: That is why, your Honor, my contention is that it is vague and indefinite and unconstitutional.

The Court: There is nothing vague about it at all. It is very definite.

Any other questions of this witness?

Mr. Ezra: No.

Mr. Rivers: No, your Honor.

[fol. 129] The Court: You are excused. Any other witnesses now?

(Whereupon the witness was excused.)

Mr. Rivers: Detective Sergeant Groh.

Det. Sgt. Daniel Groh, a witness on behalf of the People, Shield 29, Vice Squad, Nassau County Police Department, after first being duly sworn, testified as follows:—

Direct examination.

By Mr. Rivers:

Q. Detective Groh, are you a member of the Nassau County Police Department?

A. Yes, sir.

Q. How long have you been so employed?

A. 13 years.

Q. Are you on a type of duty, Detective Groh?

A. Yes, sir.

Q. What type of duty are you on?

A. Investigating gambling, vice, pornography.

Q. Were you on such a duty on October 26, 1965?

A. Yes, sir, I was.

Q. In your capacity as a detective with the Nassau County Vice Squad, did you have occasion to visit the luncheonette at 1507 Bellmore Avenue, in Bellmore, New York?

[fol. 130] A. Yes, sir, I did.

Q. Did you go there with someone else?

A. Yes, sir.

Q. Who was with you when you went?

A. Detective Anderson, Mrs. Corey and Richard Corey.

Q. Did there come a time—withdrawn. What mode of transportation did you use?

A. Used a departmental vehicle.

Q. All of you in the same car?

A. Yes.

Q. Where did you park the car with reference to the entrance at 1507 Bellmore Avenue?

A. Well, as you face the store, it would be on the right hand side of the store, about 150 feet on the right hand side of the street.

Q. Did you enter the store?

A. Yes, sir.

Q. Were you the first one to enter the store?

A. Of our party, yes, sir, I was.

Q. What did you do in the store?

A. I entered the store and sat down at the counter and ordered a cup of coffee.

Q. Were you served a cup of coffee?

[fol. 131] A. Yes.

Q. Who waited on you?

A. Mr. Ginsberg.

Q. Do you see Mr. Ginsberg in the courtroom?

A. Yes, sir.

Q. Would you indicate him for the Court?

A. Sitting in the back.

Mr. Rivers: Would the record indicate that the witness has pointed to the defendant?

The Court: Let the record so indicate.

Q. What happened after that?

A. About two minutes later Richard Corey came into the store. As he walked in the door, Mr. Ginsberg said, "Hello, Lance," and then Lance said, "Hello." That's Richard's nick name. He said, "Hello," went over to the magazine rack. He stood at the magazine rack looking through the magazines for approximately three or four minutes.

Q. Where was the magazine rack with relation to the counter?

A. As you walk in the front door, the counter would be on the right hand side. The magazine rack is directly opposite, on the left hand side.

Q. What happened then?

[fol. 132] A. Lance picked out a couple of magazines and went to Mr. Ginsberg, held up the magazines and Mr. Ginsberg said something to him, I couldn't hear exactly what it was, looked at the magazines. Lance Corey gave Mr. Ginsberg some money. Mr. Ginsberg gave some change. Lance —as Lance was paying, Detective Anderson came in and stood alongside of him.

Q. Stood alongside of who?

A. Alongside of Lance. On his right side, I believe. After he paid for the magazines, he left the store. Lance did. Detective Anderson made a purchase of cigarettes and he went out and I left.

Q. Where were you sitting with relation to the place where Lance paid for the magazines?

A. At the counter.

Q. How far away?

A. Approximately 15 feet, 20 feet.

Q. Could you see the magazines as they were being paid for?

A. Yes, sir, I could.

Q. Could you identify them at that time?

A. I could see the covers, yes, sir, as he took them off the rack and walked over to pay for them.

Q. Now, when Lance paid for them and walked out of the [fol. 133] store, did he stop any place prior to walking out of the store?

A. No, sir. Not that I recall.

Q. How soon after Lance walked out of the store did you walk out?

A. Two, three minutes. Shortly thereafter.

Q. Now, what happened then?

A. Then I walked out of the store and went to where our car was parked. Lance and Detective Anderson and Mrs. Corey were sitting in the car. Lance gave us the two magazines. We each initialed the magazines to identify them. I took custody of the magazines and took Mrs. Corey and Lance home.

Q. I show you these and ask you whether or not you recognize them, People's Exhibit 4 and 5 in evidence?

A. Yes, sir.

Q. What do you recognize in this?

A. The magazines that Lance Richard Corey purchased at Mr. Ginsberg's store.

Q. Can you show us—show the Court how Lance Corey had the magazines in his hand when he was talking to Mr. Ginsberg from your vantage point?

A. This would be the magazine rack. I was sitting to his right, approximately a little further distance than where [fol. 134] the door was and a little more angle. They were sitting in a rack such as this. As he took them off the rack I could see them taken off the rack.

The Court: Let the record show the witness has held the magazines up, with the magazine Man to Man above Escapade so that—show me how they were in the rack?

The Witness: Not in this order. They may have been two or three magazines between these two. They were in this fashion. As he pulled them out, I could see them very well.

The Court: Did you see them?

The Witness: Yes, sir, I did.

The Court: Those are the two he bought?

The Witness: Yes.

The Court: Show us how he held them in his hands when he paid for them?

The Witness: He had them in one hand like this. As he turned around, he walked—

The Court: (Interposing) Let the record show that the magazines were held in Lance Corey's hand, spread somewhat in the manner as you hold a bridge hand or poker hand.

Mr. Ezra: May he finish the answer?

[fol. 135] The Court: He asked him how he was holding them. Go ahead.

The Witness: He turned to his left and walked up to Mr. Ginsberg. He spread the magazines like this in front of Mr. Ginsberg. That's when Mr. Ginsberg said something to him. He put the magazines in the corner and paid Mr. Ginsberg some money.

The Court: When he got in front of Mr. Ginsberg, he held the magazines apart?

The Witness: Yes. Like this.

The Court: Let the record show that the witness showed the magazines to be held several inches from each other.

By Mr. Rivers (continuing):

Q. Now, Detective Groh, did there come a time when you arrested the defendant Sam Ginsberg?

A. Yes, sir.

Q. When was that?

A. The morning of the 27th.

Q. The day after?

A. No, sir. It was two days after the magazines were purchased—I'm sorry. It was the 28th we made the arrest. The 27th we went to the District Attorney's office.

[fol. 136] Q. Were these magazines in your possession up to the time of the 28th?

A. Yes, sir. No, sir. They were not. Not up to the 28th. The 27th, when they went into the Court's possession.

Mr. Rivers: I have nothing further.

The Court: You may examine, Mr. Ezra.

Cross examination.

By Mr. Ezra:

Q. Officer, I don't know whether I heard you right or not, but you were asked the question of where the magazine rack was as you entered the store?

A. Yes.

Q. Where was it with relation to the left or right of the store?

A. As you walk into the front door, facing the rear, it would be on the left side.

Q. How far away would you say that magazine rack was from the counter that you sat at?

A. From my position of the counter?

Q. Yes.

A. Approximately 10 or 15 feet.

Q. Now, can you tell us please, with reference to the [fol. 137] counter stools, on which one of the stools you sat, counting from the front of the store towards the rear?

A. I couldn't tell you counting the stools.

Q. There were counter stools there, were there not?

A. Yes, sir.

Q. Would you know about how many there are?

A. No, sir.

Q. Would you say that you were towards the front end, towards the front of the store, towards the center of the counter or towards the rear of the counter?

A. Near the center, towards closer to the front.

Q. When you sat on those or on that counter seat and you did sit on a counter seat, am I correct?

A. Yes, I did.

Q. When you sat there, were you facing the magazines or were you facing the other side of the magazines or was your back to the magazines?

A. It would be more that my right side was towards the magazines.

Q. Yes. But, as you are sitting there on that counter stool, where are you facing? Are you facing the magazines or facing the back bar of the counter?

[fol. 138] A. At what time, sir?

Q. At the time that you were sitting there.

The Court: What was the answer to that? I did not hear it. Mr. Reporter?

(Answer read back.)

The Court: The witness has a valid point. The witness says before or after Lance entered the store. Now, I would like to have you fix the time, too.

Q. How long in all did you remain in this store from the time you entered it until the time you left it?

A. From six to eight minutes.

Q. During all of that time, were you seated at the counter stool, excepting for walking in and walking out?

A. Yes, sir.

Q. While you were there, were you served something by the defendant?

A. Yes, sir.

Q. Now, other than the defendant, was anyone else working that store?

A. No one that I could see.

Q. As the defendant was serving you, was he facing you, sir?

[fol. 139] A. Well, he turned his back to get the coffee and he turned around to face me to give me the coffee.

Q. So that with relation to where these magazines are, as you are sitting on this counter stool, are you facing the magazines or are those magazines to your back?

A. Well, when I was drinking the coffee, the magazines were toward the rear and right of me. When Lance walked in, I turned so that they were more or less facing me.

Q. Now, this business of Lance coming into the store was by prearrangement by you; is that correct?

A. Yes, sir.

Q. While you were having your coffee, were you facing Mr. Ginsberg?

A. Not at all times, no, sir.

Q. Did there come any time when you completely faced around so that your face was to the magazines and your back to the back bar or to Mr. Ginsberg?

A. No, sir. I turned around so that my left side was to the back bar and I was facing the front of the store.

Q. Now, had you ever been in this store before?

A. No, sir.

[fol. 140] Q. Other than what you noticed as you walked in, that is with reference to these magazines being on the left hand side, did you stop to look at the magazines that were on these racks?

A. I didn't stop to look. I glanced at them as I went by.

Q. You glanced at them from a distance; is that correct?

A. A distance of about a foot.

Q. Are there numerous titles of magazines on those racks?

A. Yes, sir. There are.

Q. Now, I show you this photograph and ask you whether that is a fair representation of the counter, the stools of that counter and the magazine rack?

The Court: When?

Mr. Ezra: As of the time when you were there?

A. No, sir, I don't believe it is.

Q. Will you tell us in what ways it was different then than what is shown on that photograph?

Mr. Rivers: I object. The photograph is not in evidence.

The Court: Sustained. You asked him a question.

[fol. 141] He said, "No." You made him your witness.

Q. Does that fairly represent the store that you entered and that you sat at?

A. The store itself? Yes, sir.

Q. Now, other than the people seated at the counter, is that a fair representation of the store as it was on the day that you went there?

Mr. Rivers: Objection.

The Court: On what grounds?

Mr. Rivers: On the grounds, your Honor, that I don't know whether or not—there is nothing in the record to bear any reference to this particular item here. It is not marked for identification. In no way is this thing identified. I think that somehow it ought to be identified.

The Court: Suppose you mark it for identification first.

Mr. Ezra: All right.

The Court: Mark it Defendant's C for identification.

(Whereupon the photograph was received and marked Defendant's Exhibit C for identification.)

The Court: You are doing the same thing all over again. Any questions you ask this witness that is outside the [fol. 142] scope of his direct testimony with respect to location of the store and things like that, he is your witness and you are going to be bound by his answers. So, do not try to impeach him later.

Mr. Ezra: Is there any question that he is a hostile witness?

The Court: There is no evidence here that he is hostile. He is simply a police officer doing his duty. There is no question of hostility here.

By Mr. Ezra (continuing):

Q. Does that show—

The Court: Does what show?

Q. Defendant's Exhibit C for identification show the position of the magazine rack in that store at the time that you entered the store on the 26th of October, 1965?

A. Yes, sir. I believe it does.

Q. And does it also show the position of the counter and the stools at the counter as of that time?

A. I can't tell because the people block out the view of the counter there.

The Court: Let me see that. (Handed.)

[fol. 143] Go ahead, Counselor.

Q. Is that the same counter and same stools that were in the store on the day that you entered there?

Mr. Rivers: Objection, your Honor. How can he testify if this is the same counter?

The Court: Sustained. Not only that, I have taken a look at the defendant's C for identification. You are not going to get it in evidence unless you bring the photographer in and he tells me what kind of camera he was using, because that picture shows a great deal of distortion. It shows a great deal of distortion as to depth and angle. You better bring the photographer in here and have him testify as to what kind of camera he was using and what the angle is. You have a distorted prospective in that picture.

Mr. Ezra: May I ask to see the People's Exhibits 1 and 2, your Honor?

The Court: Sure.

Mr. Ezra: The photographs that were admitted in evidence by the People—is that the only one?

The Court: No. That is the only one. It is a straight on picture.

Just so that we understand each other, I want to be [fol. 144] absolutely fair to the defendant. That picture that you have there, Defendant's Exhibit C for identification, is a distorted picture. It is obviously a picture taken with a short focus lens. Do you know what a short focus lens is?

Mr. Ezra: I was in the store when the picture was taken.

The Court: Do you see the distortion, Counselor? It is not taken from behind the counter. It is taken from the middle of the floor.

Mr. Ezra: I didn't say that that was taken from behind the counter.

The Court: He already said that not to him, it isn't right. You cannot get it in evidence with him.

Mr. Ezra: All right. If you do not mind, I will not work with this picture.

By Mr. Ezra (continuing):

Q. As you enter this store, Officer—

The Court: (Interposing) That has been marked for identification. Hand it up here, please. (Handed.)

Q. (Continuing) As you enter the store, Officer, is the counter on the right hand side of the store?

A. The coffee counter?

Q. Yes.

[fol. 145] A. As you face the rear of the store, it's on the right hand side.

Q. So, as you enter the store you would be facing the rear of the store and this counter would be on the right?

A. Yes.

Q. And the magazines, sir, would be on the left?

A. Correct.

Q. And approximately how far from the front of the store, on the left hand side, were these magazines that are in evidence now as People's Exhibit 4 and 5—

Mr. Rivers: Objection, your Honor. There is no testimony here by this witness that he knew the exact location in the bookcase of these magazines. He knew how they were situated in the bookcase. There is no testimony, no indication in the record that he knew exactly where in the bookcase these magazines were.

The Court: Read the question to me, Mr. Reporter.

(Question read back by reporter.)

The Court: There is testimony to the effect that he saw Lance take them out of the rack. There is testimony to that

effect, so that the question does have some basis on cross-examination.

[fol. 146] Can you say how far from the front of the store were the magazines that Lance took out of the rack?

The Witness: I judge it to be approximately six to eight feet.

The Court: How far were they from you at the time?

The Witness: Approximately ten feet, fifteen feet.

The Court: And across the store from you?

The Witness: Yes.

The Court: That was at a diagonal?

The Witness: Yes, sir. At an angle.

Q. At the time that these magazines were taken from the rack by Lance, were you having your coffee?

A. The coffee was on the counter, sir.

Q. With respect to where you were sitting, can you tell us what was on the counter at the end of the counter on your right?

A. There were several things on the counter. Sugar bowls, creamer, I believe it was, ketchup, things like that.

Q. Was there a stand on which stockings were exhibited?

A. On the counter?

[fol. 147] Q. Yes, sir. That is stockings in sealed wrappers?

A. I don't believe there were.

Q. Did you know, sir, that there was on the side of the counter at your right, that there was a narrow space which could lead to and from the counter?

A. You mean from the cash register to the back of the counter?

Q. If the cash register was there, yes.

A. Yes, sir.

Q. There was a narrow space?

A. I believe there was.

Q. And was it to the right of that narrow space?

A. To the right of it?

Q. Yes. In other words, between that narrow space and the store window.

A. There were several hundred things on there. Cash registers, pens, candy, gum. A lot of things there.

Q. Was the cash register on the counter or was it on some floor display or case to the right of the counter?

A. It was on another display case to the right of the counter.

Q. Approximately how wide was this space between the right hand side of the counter or display case and the [fol. 148] counter itself?

A. I don't know.

Q. Now, did you see Lance go into this narrow space to pay Mr. Ginsberg?

A. Go into the narrow space—

Mr. Rivers: (Interposing) Your Honor, I am going to object.

The Court: Sustained. No such testimony on the record.

Q. Where did you see Lance pay Mr. Ginsberg for the magazines?

Mr. Rivers: I object, unless he testifies—there is no testimony that he saw him pay at all. He saw him take money out of his pocket.

The Court: I can have the record read, but he did testify, I believe, he saw Lance go over to the magazine rack. He saw Lance pick two magazines out of the rack. As he picked them out, he could see the fronts of them. Lance then put them in his hand and fanned them out as you do a deck of cards. He walked over to Mr. Ginsberg. As he got to Mr. Ginsberg, he separated the two magazines so that Mr. Ginsberg—anyway, he separated the two magazines. Mr. Ginsberg looked at them, told him how much and Lance [fol. 149] took money out of his pocket and gave it to him; is that what you said?

The Witness: Yes.

The Court: There wasn't any testimony at that time as to where he was standing exactly by this witness. That is why I did not permit your question, because it calls for a

conclusion that was not in evidence as far as he is concerned.

Q. So that now I'm asking him where Lance was standing?

A. Directly in front of the counter where the cash register was.

Q. Now, you told us that the cash register was on another counter other than the coffee counter?

A. Yes, sir.

Q. Now, would that be to the right of where the coffee counter was as you are facing it?

A. As you face the coffee counter, yes.

Q. So that the cash register was on some other case or other piece of furniture, entirely separated and apart from the coffee counter itself; is that correct?

A. Yes.

Q. All right. Now, was Mr. Ginsberg at the cash register at the time that Lance offered to pay—

Mr. Rivers: (Interposing) Your Honor, I object. I don't [fol. 150] understand whether or not this is an offer to pay. I object to the wording of the question.

The Court: No. I will let it remain. Where was Mr. Ginsberg standing, and Lance had the money and was paying, where was Ginsberg?

The Witness: Behind the cash register.

Q. So that he was not behind the counter at the time, sir?

A. Which counter?

Q. The coffee counter.

A. No, sir, he wasn't.

Q. But, you were sitting at a stool at the coffee counter?

A. Yes, sir.

Q. Now, did you hear the conversation between Lance and Mr. Ginsberg?

A. I could hear him speak, but I couldn't make out what they were saying.

Q. So that you didn't hear Lance ask how much—

The Court: (Interposing) He just said so. You do not have to go over it. He could not hear what they were saying. He could hear conversation. He could not hear the question. So why keep beating at it?

[fol. 151] Q. Did you see what money Lance gave to Mr. Ginsberg?

A. They were dollar bills, yes, sir.

Q. How many dollar bills, do you know?

A. I could see two of them.

Q. Now, will you please pick up those magazines and show us exactly—I will withdraw that. As Lance was paying for the magazines, could you see what magazines they were?

A. I couldn't read them, but I could see they were the same magazines he took off the rack.

Q. Did he have the titles facing you or did he have the titles facing Mr. Ginsberg?

A. He laid them out, sort of like this. (Indicating)

Q. So that he was holding them in two hands the way you are now, sir?

A. Yes, sir.

Mr. Ezra: I have no further questions.

The Court: Any questions, Mr. Rivers?

Mr. Rivers: None.

The Court: Step down.

(Whereupon the witness was excused from the witness stand.)

The Court: Now, have you got another witness, Mr. Rivers?

[fol. 152] Mr. Rivers: I have one more. I would like five minutes. I would like to go out and talk with him.

The Court: I will give you more than five minutes. I will give you the rest of the afternoon and night because it is now close to adjournment time anyhow and we are not going to finish today because you haven't finished your People's case. I do not know if and when there will be a defendant's case, but that remains to be seen.

Now, if you want to—I am talking to you too, Mr. Ezra, if you want to, do you want to go out and talk to him for five minutes, maybe we can get more testimony in this afternoon. I am not going to run late. I will tell you right now.

Mr. Rivers: We can adjourn now, if it is all right with the Court.

The Court: How many witnesses have you got after this one?

Mr. Rivers: One.

Mr. Ezra: May I too urge that we adjourn, your Honor, because I have a number of phone calls to make. I have not been in my office.

The Court: The Court stands recessed to 9:30 tomorrow morning. Do you have any witnesses that you have not [fol. 153] called?

Mr. Rivers: Yes. They are outside. Come in please.

The Court: Are they under subpoena?

Mr. Rivers: Yes.

The Court: All witnesses who have been subpoenaed in this case will please return tomorrow. The case is recessed to tomorrow, 9:30.

Mr. Ezra: Your Honor, with respect to the adjournment of this case. I have two very important matters to take care of tomorrow. Would it be possible that the matter be adjourned to Wednesday?

The Court: No. We are going to finish it tomorrow. I have other cases to do Wednesday.

[fol. 154]

IN THE DISTRICT COURT OF NASSAU COUNTY

STATE OF NEW YORK—FIRST DISTRICT

[Title omitted]

NON-JURY

CRIMINAL PART V
First District Court
West Wing, Old Country Rd.
Mineola, N. Y.

Transcript of Trial—April 19, 1966

APPEARANCES:

(Same as heretofore mentioned.)

[fol. 155] The Court: Are the People ready?

Mr. Rivers: The People are ready.

The Court: The defendant?

Mr. Ezra: Yes.

The Court: Any witnesses in this case, wait outside. Keep yourselves available for call.

Mr. Rivers: The People Rest.

The Court: I thought you had another witness.

Mr. Rivers: Yes, I do.

The Court: You are not calling the other witness?

Mr. Rivers: No, your Honor. Not at this time.

The Court: Mr. Ezra?

MOTIONS, RULINGS AND COLLOQUY THEREON

Mr. Ezra: Yes, sir. At this time, if the Court please, the defendant respectfully moves to dismiss the complaint in this case on the ground that the people have failed to prove a prima facie case.

I further move to dismiss on the ground that the proof is entirely insufficient in that there has been no compliance

with the letter of the statute. It has not been shown in any way or manner that this child suffered any impairment to his morals. The act itself specifically says that it must be [fol. 156] shown that there was a predominant appeal to the prurient, shameful or morbid interest of the minor or and this is another ground on which I move to dismiss or that it is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors and furthermore, it must be shown and it has not been shown here and I urge this as a separate ground for dismissal, that the material is ultimately without redeeming social importance to minors.

Now, I respectfully refer your Honor, in this respect to what is perhaps one of the most cited cases in this field of law and I refer to the case People against Richmond County News Inc., cited as 216 N.Y. Sup 2nd 389.

In that case, the Court went into the questions which I have raised here and I would like your Honor not only to look at that decision, I have made some "X" marks in ink on it and it shows the standards that the Court has set forth obscenity. It shows the standards that the Court has set with respect to the proof to be offered.

The Court: This is a case that was decided in 1961?

[fol. 157] Mr. Ezra: Yes, your Honor.

The Court: Four years before the statute was enacted.

Mr. Ezra: Yes, your Honor. But, your Honor, the question is not when it was decided. This case has never been upset in any way and the standards in connection with what is obscene and what is harmful is, of course, set forth in that particular case.

Now, in order for the State to have met the requirements of the statute they must show in what manner this material is harmful to minors. There was no proof whatever brought out that it excited the lust of this infant who purchased these magazines. There was nothing there to show that it harmed him in any manner. The proof is entirely barren of those essentials of the statute and I ask the Court to take into further consideration the fact that that statute

went into effect only 40 days before the alleged occurrence here. This was in October that this alleged—

The Court: What has that got to do with it?

Mr. Ezra: It has a lot to do with it. In fact, there was no publicity, no standard by which this person could go by.

[fol. 158] The Court: Are you pleading ignorance of the law?

Mr. Ezra: No, your Honor. I am not. I understand that ignorance of the law is no excuse. That is fundamental.

The Court: May the Court keep this or is this your only copy?

Mr. Ezra: Your Honor can keep it. Your Honor, of course at this time, I also urge again all the motions that were made at the beginning of the trial on Constitutional grounds and if your Honor wants me to, I can read them over again and put them into the record.

The Court: No need to read them over again. We will deem that they are incorporated by reference into your present motion.

Mr. Ezra: And specifically, I again urge, especially with reference to 484(h) 2(a), that there has been no showing here whatever, that these were photographs that were separate from magazines and I think that if your Honor will carefully read the statute and I am sure that your Honor has, that you will find the distinction between 2(a) and 2(b) because they are not synonymous with one another and [fol. 159] there is a difference, otherwise they would not have been stated as such in the sections, the difference being that one, specifically 2(a), is a photograph and 2(b), it says a photograph within a magazine or a book or anything like that—

The Court: (Interposing) Well, the principle difference, I find between 2(a) and 2(b), is the fact somebody includes other printed matter that may be sexually exciting. However, I cannot and I said this before, I cannot say and find at this time that simply because photographs which depict nudity are framed within the covers of a magazine, that they are no longer photographs within the meaning of 2(a).

I will not find that. I rule now that as far as I am concerned, as far as this Court is concerned, that a photograph is a photograph and if it depicts nudity, it does not make any difference whether it is an individual photograph, framed or unframed or contained within the contents of a magazine that is offered for sale and sold to a minor. If I am wrong about that, the Appellate Courts will rule me wrong, if it ever gets to that point.

Mr. Ezra: Of course, your Honor, I have urged it because that is my personal interpretation of the statute and [fol. 160] I think that it was meant to be different.

The Court: You are within your rights in urging it, Counselor.

Mr. Ezra: Thank you, your Honor. I further urge a dismissal. There is a case called People against Bookcase, which I ask your Honor to read and of course I told your Honor that we would brief these various matters for you where the Court has specifically said—

The Court: What is the citation?

Mr. Ezra: I will give the citation.

The Court: It may not be necessary to brief anything.

Mr. Ezra: All right, your Honor. That where a statute and in particular this statute does not distinguish between art and other matter and therefore the statute is too broad and too vague and that the reading of this statute would indicate that a person who buys the New York Times, a person who buys Reader's Digest, a person who buys any one of the photographic magazines which have all been declared by the United States Supreme Court not to be obscene, is violating a statute and here this statute is broad, [fol. 161] vague, indefinite without distinction as to the works of art of masters, that we know to be hanging in museums.

The Court: Just so that I understand you, Mr. Ezra, is it your contention that Exhibits 2, 3, 4 and 5 in this case are works of art?

Mr. Ezra: No, your Honor. I didn't say that or that they are art forms. I say this, I cannot say anything like that

because I am not an expert and I do not know if the Court is an expert.

The Court: You are an expert in the sense that you have looked at pictures that are commonly accepted as art.

Mr. Ezra: I have looked at some, yes.

The Court: So has the Court looked at some. Now, within the definition of art what is your definition of art, Mr. Ezra?

Mr. Ezra: Art, I think is the general acceptance after years. At the beginning they may have been determined absolutely—

The Court: (Interposing) Art is a skill in drawing, painting, architecture, other fields of design, etc., etc. It has a very well understood meaning. Now, we have the many different forms of art and we have many different [fol. 162] schools or so called experts or pseudo-experts in the field of art. If you have any experts that think Exhibits 2, 3, 4 and 5 are in art form. I would be very glad to hear from them.

Mr. Ezra: The thing is you are placing the burden on the defendant. Is that what your statement tends to say?

Mr. Rivers: No, I did not tend to say that at all. You are pleading that it is an art form.

Mr. Ezra: No, I did not.

The Court: You mentioned art.

Mr. Ezra: I said there is no distinction in the statute between what your Honor and I might call art and what these various—

The Court: (Interposing) The statute does not say art. The statute says utterly without social importance.

Mr. Ezra: And your Honor, I can now give you a decision, in fact, the magazine Escapade, the magazine Gent, which is the most outlandish of all the magazines and I have that citation here, have been declared by the Courts not to be without merit.

The Court: Have been declared to be not without merit. Go ahead. What is the citation.

[fol. 163] Mr. Ezra: I do not know if your Honor—I may not have chosen the best words, your Honor. I believe that you should realize that I am a little bit under stress and I do not think the choice of words should be picked on by the Court.

The Court: I am not picking on them. I am trying to get your thought.

Mr. Ezra: I will be more than happy to restate it if I have made a mistake in English.

The Court: As a matter of fact, your grammar is structurally correct.

Mr. Ezra: Thank you.

The Court: What is the citation and you did not give me the citation against Book.

Mr. Ezra: "Gent" is the citation that your Honor has.

The Court: You mean People against Richmond County News?

Mr. Ezra: That is correct. That refers to "Gent." I have a decision here, your Honor, by the County Court of Kings County. Judge Sobel, who has written numerous articles with respect to criminal law and I ask your Honor at some appropriate time and especially after we give you the brief that we say we are going to give you to to read this case [fol. 164] of People against Brooklyn News Company, Inc.

The Court: Citation?

Mr. Ezra: I do not have the citation here, your Honor, but I can let your Honor have this, which I am handing to the Court at this time. (Handed.) That is one of the landmark decisions as well. I have a number of Supreme Court of United States decisions here and I refer specifically to a case decided in the October Term, 1963 under number 449, which is entitled "A Quantity of Copies of Books and Others, appellants against the State of Kansas," decided June 22, 1964, which deal with the same subject matter of community standards of what is and is not pornographic. The fact that if there is anything at all redeeming in a book of the kind that has been offered in evidence here, that that takes it out of the statute as being pornographic.

I refer your Honor to the case of Jacobellis as against the State of Ohio, which was referred to by Mr. Rivers here.

The Court: Aren't we getting ahead of ourselves a little bit? All we have gotten so far is the People's case. You are making a motion to dismiss?

[fol. 165] Mr. Ezra: Yes, your Honor.

The Court: Now, the People's case is up to this point. Now, you are urging—you are giving me cases if there is anything redeeming, etc., etc. Now, I do not say the burden of proof is on the defendant. The burden of proof is always on the People to prove beyond a reasonable doubt that the defendant is guilty. But, if the defendant is urging a viewpoint, at least they should come forward with some evidence.

Mr. Ezra: No, your Honor, because the People must prove the elements of the complaint. One, that it was harmful.

The Court: I just stated that.

Mr. Ezra: Yes, your Honor.

The Court: I just stated that, so let's not go over that again.

Mr. Ezra: So, the question is have they proven any harmful effect.

The Court: That is what I am going to decide on your motion to dismiss.

Mr. Ezra: Have they proved that this incited them to lust?

The Court: They do not have to prove that this incited [fol. 166] them to lust under the statute.

Mr. Ezra: There are other matters which I can say to your Honor and I refer to another case of Mannual Enterprices Inc. against J. Edward Day, Post Master General, which refers to magazines of this exact type and nature. It involved the mailings of those magazines.

The Court: Are you a witness in this case?

Mr. Ezra: That is the wife of the defendant.

The Court: Is she going to be a witness?

Mr. Ezra: Yes. You cannot come in, please.

(Woman leaves courtroom.)

Mr. Ezra: One other point, your Honor. The People have failed to prove that these books are ultimately without any redeeming or social importance and they have failed to prove that it is that. The burden is not on me to prove that they are, but on the People to prove that they are not. Nor has the question of community standards on a national scale which is called for in all of the decisions gone into by the People and for those reasons I urge a dismissal of the complaint.

The Court: Yes, Mr. Rivers?

[fol. 167] Mr. Rivers: Your Honor, as I understand it, at this time in the case, a criminal case, there is a motion which is to be addressed by the Counsel for the defense to dismiss for failure to make a—prove a prima facie case. I think that that was the motion that Mr. Ezra was making.

With all due respect to Mr. Ezra, I think that he has gone far afield in some of the citations which he alluded to. People vs. Richmond News Inc. and People vs. Brooklyn News Company Inc., had to do with the statute 1141 and 1142 of the Penal law in that these statutes prohibit the sale of obscene prints and articles, hard core pornography. The Statute that we deal with here has to do with the harmful materials and as I stated before at the beginning of this case when Mr. Ezra made his motion with regard to the constitutionality of the statute, it has to do with the power of the State to protect children or minors from the dissemination of hard core materials. Mr. Ezra, in addition alluded to the People vs. the Bookcase case which was made March 31, 1964 and decided July 10, 1964 by the Court of Appeals of this State.

However, at that time, the statute 484(h) was written [fol. 168] and couched in these terms. It prohibited the sale to minors under 18 years of age any books the cover of which exploited or is devoted to or is principally made up of descriptions of illicit sex or morality. This is found

in the beginning of the Bookcase case, which is 14 N.Y. 409. That is the citation of that case. That statute was deemed by the Legislature, based upon the decision on the Bookcase case and the other case which I alluded to, the Kahan case, which is found at 15 N.Y. 2d 311. The statute was vague and indefinite.

Now, in passing the statute which is before the Court now, the new statute, 484(h), which became effective September 1, 1965, the message by the Governor, Nelson A. Rockefeller of this State, and I quote, "Recently the Courts," the third paragraph of that message, "have indicated that society's have transcendent interest in protective the welfare of children, leaves some room for sustaining carefully drawn legislation. This bill, which appears to meet every constitutional test imposed by the Courts will be an invaluable weapon in the hands of parents and Law Officers alike in the fight for decency." That we find that the Legislature observed the holdings of the two cases cited before they drafted such a statute [fol. 169] will be invaluable weapon in the hands of parents and law enforcement officers alike in a fight for decency. This is a quote found in the Session Laws of 1965 at page 2101 from the "Message by Governor Rockefeller of This State."

Now, the statute which we deal with now is entitled, "Harmful Materials." There are certain standards laid out as to what is nudity. How much of the female breast must be shown in order to indicate nudity. Now, I think that Mr. Ezra is in error when he states that the standards as laid down by the statute must be shown by the People in their case. These are matters of facts to be decided by the Court. Whether or not these Exhibits 2, 3, 4 and 5 predominently appeal to the pruriently and shameful and morbid interest of minors, is patently offensive to the standards of the adult community as a whole with respect to what is suitable material for minors and is utterly without redeeming social importance to minors. One of the fundamental concepts of the trial of the case is that any exhibit in evidence is before the Court.

It is the Court's duty or it is the Court's obligation, when [fol. 170] there is a non-jury trial to decide whether Exhibits 2, 3, 4 and 5 meet or do not meet these standards as to what is harmful to minors. Within the statute there is built in the questions to be decided by the Court with regard to what is harmful to minors. I notice that Mr. Ezra went on and with all due respect to Mr. Ezra, he went on to cite other cases that had to do with the concept of hard core pornography.

I have stated in the beginning of this case is whether or not this is pornography isn't the issue in this case. It is whether or not it violates the statute of 484(h). If it violates the statute as laid down clearly and unequivocally in this statute, then we have a violation of law aside from the fact that this is pornography. The word "pornography" is not even used within the statute. The language which I read to you from the Cahn case, written by Judge Fuld in the Cahn case here, has indicated and this is the highest court of our State; that the supervision of children's reading is a justifiable area in which there can be legislation by the State without abridging the freedom of speech and it goes on to cite some of the leading Supreme Courts of the United States such as Butler vs. Michigan 352 U.S. 380. Jacobellis vs. Ohio and of course the leading [fol. 171] case, the People vs. Roth, which I believe I gave the citation. That citation is—Roth vs. The United States 354 U.S. 476. I think that during the entire trial of that case and during the cross-examination of Mr. Ezra, I gleaned from this that Mr. Ezra has made a fundamental misinterpretation of the statute. He keeps talking about pornography. He continues to dwell upon whether or not the material within these exhibits are pornography; whether or not they are hard core pornography. This is something aside from what we are trying here. There are statute legislations here against hard core pornography, such as 1141, 1142. There are other statutes within this which have to do with hard core pornography and which have to do with standards set for adults. This stat-

ute was set aside. 484(h) for minors and it so states within the statute. It even cites the age level here. Exposing material to minors under the age of 17 years—of 17 years of age, this is harmful material. It has nothing to do with the citations alluded to Mr. Ezra. It has nothing to do with hard core pornography.

The issue in this case is whether or not there was in fact [fol. 172] a sale. The issue to be decided by the Court is whether or not these three standards, the standard of whether or not this has no redeeming social importance; whether or not it is patently offensive to the standards within the community and whether or not it predominantly appeals to the prurient interest. No amount of statements by Mr. Ezra or myself can say whether or not these are so, whether or not these standards have been met. The Court, as a matter of fact, must decide, based upon the exhibits which are before the Court whether or not these standards have been violated by the sale of these Exhibits 2, 3, 4 in evidence. This is the issue of this trial.

The Court: Thank you.

Mr. Ezra: If the Court please, just one comment. I agree with a number of things that Mr. Rivers has said, but he does not take into consideration the fact that whether something is harmful to minors is a question of fact which your Honor must decide after proof taken and I say that there has been no proof of any kind, either by way of psychologists, psychiatrists, school authorities, officials who are witnesses that can be determined expert witnesses [fol. 173] to show that there are harmful effects that can occur to infants or to minors as a result of reading publications of this kind. The Court cannot judge something from facts not in evidence before the Court.

The Court: Mr. Ezra, let me ask you a question. Whether a Court is a trier of the fact or a jury is the trier of the fact, isn't it true that the trier of the fact has a right to use his every day experience, his common sense and his knowledge from living, in determining and drawing conclusions and inferences from the facts before him?

Mr. Ezra: Yes, your Honor.

The Court: Then, may not the trier of the facts, in dealing with a certain age group, determine from the evidence before him, whether in the conclusion, the trier of the facts, whether it is a jury or a judge, whether or not the material is prurient or morbid? May not the trier of the fact determine whether or not the American community have certain standards by which it can judge whether or not the material before him, either the jury or the Court, is suitable material for minors? We must under- [fol. 174] stand that this is a new section of the law and you very kindly said that I must have read this section very carefully. I have read it very carefully, not once, Mr. Ezra, but I think I have read it very carefully 15 times, including yesterday and last night. I think that the Court must bear in mind the fact that although these cases that you have cited do set forth certain law, that the Legislature of the State of New York, when it drafted this new section had in mind—they must have had in mind all the decisions of the United States Supreme Court and the decisions of the Court of Appeals and all the Courts that preceded the drafting of this ordinance and that it was therefore a legislative intent to enact an ordinance or a statute which would protect minors.

I might as well say at this point, minors. What kind of minors? The Legislature said 17 years of age. Now, we know that in our American cultural society, that once you get above 17 years of age, you are in the vast majority of cases involving minors dealing with high school grads or college students or People who have entered industry as high school grads. But, below 17 years of age was the [fol. 175] group of minors with whom you are dealing. You are dealing with high school students and junior high school students. I am leaving out the public school students because their awareness is so limited as prepuberty or preadolescent children or minors, their awareness is very limited. But, we are dealing specifically and the Court must interpret that this is the intention of the Legisla-

ture. They deal specifically with young people in an age group of junior high school students and high school students. This is the group with which we are dealing.

Now, the Legislature does not say anything about obscenity. It does not say anything about pornography. All it says is, in essence, does the material or does the photograph or the representations or the showings or the magazine articles, etc., etc., is it harmful to minors.

Now, the Court has reached certain conclusions with respect to that which the Court will state at the proper time. But, I might as well say now, if I am wrong, I am wrong, but I might as well say now that I do not deem this section 484(h) of the Penal Law, which went in effect last [fol. 176] September, 1965, to be governed by the mass of decisions that were made under different sections, which are presently in existence and sections of the Penal Law that have been repealed because there was the specific intent of the Legislature to enact a law that did not come within the perview of those sections.

Now, as the Court of original jurisdiction, I am going to have to make an interpretation. I am going to make a decision which will be this Court's decision. So, at this time, unless you have something further to add before I go any further, Mr. Ezra, do you have anything else to add?

Mr. Ezra: Yes.

The Court: Have I made myself very clear?

Mr. Ezra: You certainly have.

I would like to say in answer to your Honor's statement concerning the intent of the Legislature, that the Legislature certainly did not state either in its comments or in the act as passed, that the Judge, without proof as to what effects are harmful to minors, what is considered to be the photographic content or other contact, that it condemns, under the statute, without proof of such material and what effect it may have on the children and furthermore, your [fol. 177] Honor has just stated that the Legislature does not say what is obscene and what is pornographic, which is

exactly the point that I raise when I say that this statute too is vague and indefinite and too broad, because it makes no distinction between art, where, for example, I have a number of things and I believe that Your Honor will at least let me mark them for identification, if not in evidence, even the pubic hairs are showing, which are of a much worse nature from a moral standpoint, than any of these photographs.

The Court: But, the test here, Mr. Ezra—I do not want to cut you short. I am not being rude to you, you understand.

Mr. Ezra: Yes.

The Court: But, the test here is not obscenity per se or pornography per se. The test here is what, in accordance with the standards of the adult community, taken as a whole, is harmful to minors.

Mr. Ezra: Correct.

The Court: Or offensive—let's get the exact language, "patently, according to the prevailing standards of the adult community as a whole."

Now, this leaves a whole field for judicial interpretation. [fol. 178] I might as well say now that I gave a great deal of thought to that subdivision 2f of this law. If subdivision 2 is patently offensive to prevailing standards in the adult community as a whole and I may say that I gave a great deal of thought to that particular section of the law.

What was the Legislative intent? What was the Legislature trying to accomplish? Did the Legislature mean that in order to establish prevailing standards of the adult community as a whole, that the people had to go out and take a vote as to what their standards were, every time they wanted to prosecute a case for the sale of harmful material and where would they take the vote? Would they take it in Merrick? Would they take it in the County of Nassau? Would they take it in the State of New York or the United States of America?

It is plain to see that the Legislature had no such ridiculous intent that the people, in order to prosecute a case

under this section had to go out and take a vote or a poll of all the people in the United States of America as to what [fol. 179] their standards were each time they wanted to prosecute. Of course, that would be a ridiculous supposition. Furthermore, what did the Legislature mean by the "community as a whole?" Did they mean as in this case, the community of Bellmore? What the prevailing standards were in Merrick or Bellmore? I doubt that, because the prevailing standards in Merrick or Bellmore might be one set of standards and I can think of certain geographical areas not too far distance to where we are convened today, where if you take them as an entity or graphic area and took a poll in that area, what the prevailing standards were, that you would get an entirely different set of standards. Then you would be in a different situation in what would be a crime in Merrick, would not be a crime in another small community, using the word, "community" which is obviously discriminatory. It cannot be. So, the Legislature did not mean that. What did the Legislature mean? The Legislature said what they mean. The community as a whole.

Now, that means to this Court, it does not mean a geographical territory delineated. It does not mean a strata of society as such. Community. What is a community? [fol. 180] In its largest sense, it means the public. It means society. Within the contention of our situation, it must mean the American society or the American community. It does not mean the Polynesian community. It does not mean the African community. It cannot, because we cannot go so far afield. So, it must mean the American community.

Now, we have gotten to that point. So, we must think of the American community as a whole. Whether you call it national or state wide does not make much difference. It is the American community.

Now, I think the Court can take judicial notice of the fact that our American community, that the essence and the core of the American community, is the American family and who constitutes the American family, the moth-

ers, fathers and children. I think the Court, from its experience, and I am sure if a jury were sitting as the trier of the fact, might have the right to do the same thing. The Court, from its experience can take judicial notice of the fact that the American community, consisting of adult com-
[fol. 181] munity, who, in the main, consist of parents, either mothers or fathers or people who were or are about to be parents, have certain standards as to the type of pictures, the type of literature, the type of printed material to which they do not want their children subjected at an age when they are highly impressionable, which is at a junior high school level, which is what the Legislation meant when they said under 17 years of age. That is the prevailing standard.

I think the Court has a right to take judicial notice of that fact and the Court will. So, without debating it any further, unless you have some new material which you wish to add, I am ready to rule on your motion.

Mr. Ezra: We must take into consideration—now there was no evidence here as to whether this boy was married or not. You see, your Honor, we have got to look at the facts in this particular case. If this boy was married, then this could not appeal to his prurient interest. The fact that he is 17 alone—

The Court: 16, Mr. Ezra.

Mr. Ezra: 17 is what the statute says.

[fol. 182] The Court: He is 16.

Mr. Ezra: Yes. But, of course, we do not know whether this boy—it has not been proven that he has not had intercourse.

The Court: Mr. Ezra, you are moving from the general to the specific. According to the statute there is no need on the part of the People to prove that the particular individual to whom the material was sold, was excited either sexually or that lust was aroused in him or that any morbid curiosity or unhealthy curiosity was aroused in that particular individual. The section says and it is very clear, "when it predominently appeals to the prurient, shameful

or morbid interest of minors." Not this particular minor, but all minors taken as a whole or generally speaking.

Now, this is for the Court or the trier of the fact to determine. The Court must determine whether this material is prurient; whether it appeals to the prurient or morbid interest—curiosity of minors. I am sure, unless you wish to argue, Mr. Ezra, and I will be perfectly willing to listen to it, but if you wish to argue that these four magazines, People's Exhibits 2, 3, 4 and 5 are art, I will listen to your [fol. 183] arguments. But, I might as well tell you now, unless you can give me some very strong arguments on behalf of it. The pictures I find and it showings that I find in these magazines are not pictures of nudes in an artists sense. They are merely pictures of naked women and there is a difference.

Mr. Ezra: All right, your Honor. I have made my motion.

The Court: The Court has stated its position in the matter so that there would be no misunderstanding.

Mr. Ezra: If I may be allowed to present your Honor, during the course of the trial or perhaps immediately after, with the veto of Governor Hughes of New Jersey, where an attempt was made to pass the exact same section, 484(h) here.

The Court: Exact? Haec verba?

Mr. Ezra: Your Honor, practically word for word and the Governor for New Jersey vetoed it on the ground that it was vague and did not take away the infirmities of the prior statutes.

The Court: Let the record show that the Governor of the State of New Jersey, according to your statement, vetoed a similar statute in the State of New York. The Court will take that into effect.

[fol. 184] Mr. Ezra: Thank you.

The Court: Your motion is denied.

Mr. Ezra: Respectfully except.

The Court: You have your exception.

The Court: Recess for five minutes.

(Whereupon a five minute recess was taken.)

The Court: Are we ready to proceed in the People against Ginsberg?

Mr. Ezra: Yes.

ALLEN M. HANINGTON, a witness on behalf of the Defendant, residing at 2033 Jones Avenue, after first being duly sworn, testified as follows:

Direct examination.

By Mr. Ezra:

The Court: Before you proceed, Mr. Ezra, someone walked in the courtroom. Is he a witness in this case?

Mr. Ezra: No.

Mr. Rivers: No.

The Court: Go ahead.

Mr. Ezra: If the Court please, in the examination of this witness, I will require the photograph that was marked for identification.

[fol. 185] Q. Mr. Hanington, what is your business or occupation?

A. Photographer.

Q. And by whom are you employed?

A. Drennan Photos Inc., Mineola.

Q. For how long have you been in the employ of Drennan Photos Inc.?

A. 17 years.

Q. Is Drennan Photos Inc. a commercial photographer?

A. Yes, sir.

Q. Have they been in business for a longer period of time than your employ with them?

A. I believe at least 27 years.

Q. Now, for how long have you been a photographer?

A. Since 1939.

Q. During that time, sir, have you had occasion to photograph people, places of business and other matter connected with photography?

A. Yes. Many times.

Q. Now, in connection with commercial photography, do you have any—do you photograph places of business in a given month?

A. 30, 35 calls per month.

Q. Can you estimate for us how many places of business you photograph over a period of a year?

[fol. 186] A. Well, we'll say on the basis of 30 per month, 360, perhaps 400. Say 400 a year.

Q. Would that include more than one photograph of a particular place of business?

A. Yes, it would.

Q. Is that the business that you conduct, sir, with Drennan Photos?

A. Yes.

The Court: Is that Drennan or Brennan?

The Witness: Drennan, with a "D".

Q. That's on First Street, in Mineola?

A. 156 First Street, yes.

Q. Do you have any recollections, sir, of having appeared at a stationery store on Bellmore Avenue, in Bellmore, in connection with photographing the store itself?

A. Yes, sir.

Q. And at the time that you appeared there, were you commissioned to take certain photographs?

A. Yes, sir.

Q. Do you recollect, sir, if I was there at the time that you took these photographs?

A. You were, sir.

Q. Did you and I together work out the different angles [fol. 187] from which the store was to be photographed?

A. Yes, sir.

The Court: Will you stop a minute, please, Mr. Ezra. Will you go and tell that lady when I told her to stay away from the courtroom, I mean stay away from the door, too.

All right. Proceed, Mr. Ezra.

Q. Would you tell the Court please the type of camera that was used in the photographing of this defendant's premises?

A. Twin Reflex. What we call a two and a quarter and two and a quarter. That's the size of the negative it produces. It's a Japanese Yashica with a standard 80 millimeter lens.

The Court: Taking lens or viewing lens?

The Witness: Taking lens.

Q. Is that the camera you use in other work that you do in photography?

A. That's accepted standard today.

Q. Is that the camera that you used in the taking of these photographs, sir?

A. Yes, sir.

Q. Now, did you use any flash attachment?

A. An electronic strobe.

[fol. 188] Q. Is that likewise standard, sir?

A. Yes, sir.

Q. In connection with the photographs that you took, did you use any equipment which in any way distorted or made unreal the area you photographed?

Mr. Rivers: Objection.

The Court: Sustained.

Q. Did you take these pictures in the manner in which you take other pictures at various times?

Mr. Rivers: Objected to.

The Court: No, I will let him answer that. Let me ask you a few questions, Mr. Hanington. You say the Yashica 80 millimeter reflex is standard equipment for commercial photography. That is not wholly correct, is it? Don't you use Speed Graphics? Isn't it according to the job you have to do?

The Witness: That is true, sir.

The Court: So, at times you use a miniature reflex, which is a copy of a Rolleiflex, isn't it?

The Witness: Yes.

The Court: Other times you might use a view camera with tilting backs, correct?

The Witness: Yes.

[fol. 189] The Court: What is the function of using a view camera or plate camera with a tilting back?

The Witness: For better composition for one. You have your viewing panel, for tilting back, rising, falling fronts you might use on confined quarters to cut down on distortion.

The Court: Right. That is absolutely correct. What is the focal length of the ordinary camera that you use with a plate or tilting back or rising and falling fronts?

The Witness: The average?

The Court: Yes.

The Witness: It could run anywheres five and a half, eight inches, sir.

The Court: What is the focal length of an 80 millimeter camera?

The Witness: They don't run much over two or three inches.

The Court: Now, isn't it true, Mr. Hanington, that compared to the camera which has been standard for many years in the field of newspaper photography and commercial photography, Graflex, Speed Graphics, that an 80 millimeter camera was comparatively a short focus lens?

[fol. 190] The Witness: True.

The Court: Is it not true that when you take a picture with a short focus lens, one, the reason for taking it is that you have a greater depth of field?

The Witness: True.

The Court: Is it not true that when you take a picture with a short focus lens for greater depth of field, is it not the truth that you get a distortion of depth perspective?

The Witness: That's not necessarily true.

The Court: That is your answer? In comparison with using a Speed Graphic or Graflex or any standard focal length camera of five inches, do you not get distortion?

The Witness: Well, sir, if I may ask—

The Court: (Interposing) You answer my questions.

The Witness: There are many things on distortion, your Honor.

The Court: Of perspective?

The Witness: Not as great as dealing with vertical lines, sir.

The Court: Did you get distortion of perspective, Mr. [fol. 191] Hanington?

The Witness: I would say no.

The Court: All right.

By Mr. Ezra (Continuing):

Q. With the camera that you used sir, and the area that had to be photographed by you on this assignment, did you obtain any distortion in the films that you took of this place of business?

Mr. Rivers: Objection.

The Court: Sustained. I will be the Judge of whether or not there is distortion. I will be the Judge as to the credibility of the witness according to the answers that he gave me.

Q. What you took are negatives; is that correct, sir?

A. Yes, sir.

Q. Did you bring those negatives with you?

A. I have, sir.

Q. May we have them, please? (Handed.) How many in all were there?

A. I took six, sir.

The Court: Let's not take the long way around. You want to get that picture in evidence.

Mr. Ezra: Yes.

[fol. 192] The Court: Ask him if he took that picture. I will be the Judge of whether or not he has a distorted perspective, according to the equipment he took it with, to save time.

Q. I show you Defendant's Exhibit C for identification and ask you, sir, whether you took that photograph of the defendant's place of business?

A. Yes, sir, I did.

Q. Do you know when you took that photograph, sir?

A. January the 8th, 1966.

Q. Did you then, from the negative that you took, develop this picture?

A. Yes, sir.

Q. Is that a fair representation of the area of the store that you photographed on January the 8th, 1966?

A. Yes, sir. That is printed from a full negative as we call it.

Mr. Ezra: I offer it in evidence.

Mr. Rivers: Let me see it.

The Court: Show it to Mr. Rivers. (Handed.)

Mr. Rivers: May I have a few questions?

The Court: On a voir dire?

Mr. Rivers: Yes.

[fol. 193] The Court: Sure.

Voir dire.

By Mr. Rivers:

Q. Mr. Hanington, would you say that the store in which you took this photograph at 1507 Bellmore Avenue is a relatively confined area?

A. It was, sir.

Q. To the questions asked by the Court, you answered that you did not use a tilting back; is that right?

A. No, sir.

Q. Did you do anything else; use any other equipment to cut down on distortion?

A. No, sir.

Q. Now, with regard to the perspective in this Defendant's Exhibit C for identification, would you say that there is some distortion there with regard to the photograph?

Mr. Ezra: Your Honor, that has already been answered.

The Court: No, it has not. This is cross-examination.

Mr. Ezra: This is voir dire, not cross-examination.

The Court: On the voir dire, question of admissibility. [fol. 194] The Witness: I would say there is no distortion there, sir.

Q. Not with regard to distance of perspective, no distortion?

A. The best that the camera can do, sir.

The Court: The best that camera could do?

The Witness: Well, sir—

The Court: (Interposing) Now Mr. Hanington, listen to me carefully. If you took that same picture from the same position with a four by five plate camera, would you get that depth of perspective that you got in that picture?

The Witness: Almost the same, sir. You would get a wider area here, left to right.

The Court: Would you get the same apparent depth of perspective, the same feeling of distance, if you took it with a four by five plate camera?

The Witness: You might make the store look longer, sir. Sir, may I explain? I had my back to the wall. Now, with a wide angle lens on a Graphic, sir, you might pick up another tier like this. Perhaps they keep cards there.

The Court: I have gotten your testimony, Mr. Haning- [fol. 195] ton. You are telling me it would not make any difference of the apparent distance from the position of the magazine rack, even if you took the picture with a four by five plate or three and a quarter and three and a quarter, that the apparent distance would seem the same?

The Witness: From the full negative?

The Court: Yes. Is that what you are telling me, Mr. Hanington?

The Witness: It's an odd comparison, Judge. We never set two of them up and tried it.

The Court: You never tried—you do not know the depth between depth of field and perspective distortion between a short focus lens and a long focus lens?

The Witness: I do. I can't give you honest testimony now about the difference between a Graphic—

The Court: (Interposing) But there would be a difference?

The Witness: Yes.

By Mr. Rivers (continuing voir dire):

Q. How many times, Mr. Hanington, have you been in this store?

A. The first time.

[fol. 196] Q. Have you been in the store since then?

A. No, sir.

Q. Could you tell me what Defendant's Exhibit C depicts; what portion of the store?

A. That is from the rear, sir, with a luncheonette counter to the left. There is a card counter on the right. A newspaper counter. Coca Cola stand. Perhaps a freezer down by the store front by the window there. Of course, the entrance to it and the magazine rack on the right side, sir.

Q. This depicts the rear of the store?

A. It was taken from the rear of the store, looking toward the front entrance.

The Court: We have had enough, Mr. Rivers. Do you have any objection to that picture?

Mr. Rivers: No.

The Court: Do you offer it in evidence?

Mr. Ezra: Yes.

The Court: All right. Receive it in evidence.

(Whereupon the picture was received and marked Defendant's Exhibit C in evidence.)

By Mr. Ezra (continuing cross examination):

Q. Mr. Witness, I show you another photograph and ask you whether this is a photograph that you took on the [fol. 197] same day of the same store? That is my question, sir.

A. It is, sir.

Q. Can you tell us what that photograph depicts?

A. That's looking across the counter and the back, with a case that probably holds food of some sort. Cash register, mixing machines, coffee urns, cigarette display.

Q. Did you take that picture with the same camera that you took the previous picture?

A. Yes, sir.

Q. Is that in any way distorted, sir?

Mr. Rivers: I object.

The Court: No. I am going to let him answer it. If he is going to say it is not in any way distorted, I would like to hear him say it.

Mr. Ezra: Your Honor, you are intimidating the witness. I don't think this is fair.

The Court: I am not intimidating the witness at all.

Mr. Ezra: Of course, your Honor.

The Court: Mr. Ezra, he is here as an expert.

Mr. Ezra: Yes.

The Court: I want to hear what he has to say as an expert.

[fol. 198] Mr. Ezra: But when your Honor says I want to hear him deny that—

The Court: I did not say, "deny."

Mr. Ezra: Yes, you did.

The Court: Mr. Ezra, that is the end of that. I said I want to hear him say there is no distortion in that picture taken with a short focus lens.

What is the question, Mr. Reporter?

(Question read by Reporter.)

The Court: Answer the question, Mr. Hanington.

A. I only have one word to say, yes or no?

The Court: You can say whatever you want.

The Witness: Well, your Honor, this word "distortion," it could be distorted with a two and a quarter. It could be distorted with a four by five.

The Court: Mr. Ezra asked you a question. You answer it.

The Witness: It is not distorted.

Q. Does that show the actual condition of the back bar as it existed on the day that you took these photographs?

Mr. Rivers: I object to that.

[fol. 199] The Court: I will sustain the objection, because you have not established where he took the picture.

Mr. Ezra: All right, Judge.

Q. Now, if you recall, sir, where did you take that picture from?

A. From the rear of the store. Once again, sir, slightly to my left. Turned slightly to my left to include—looking over the counter there. Approximately from where the other exhibit was photographed from. From the rear of the store, turned to my left.

Q. Does that picture fairly represent the back bar of the counter and the material on it as of the day when you took that picture?

Mr. Rivers: Objection. I object, your Honor, on the grounds that this has no probative value. We are concerned with the day of October 26 and October 18. We're not concerned with the date he took the picture.

The Court: I will take it. Objection overruled. Do you want to offer it in evidence?

Mr. Ezra: I do.

The Court: Offer it in evidence. Show it to Mr. Rivers. (Handed.) Make your objection, Mr. Rivers.

[fol. 200] Mr. Rivers: Your Honor, I object to the admission of this picture in evidence on several grounds. I object on the grounds first of all, that this does not depict anything. As a matter of fact—as a matter of fact, it is impossible to state that this was taken in that store, from what position it was taken. Further, I object on the grounds that although this may show a certain equipment in the store. It shows no actual portions of the store. I object on the grounds it has no probative value.

The Court: What is the date this was taken?

Mr. Ezra: January 8th, he says, 1966.

The Court: I will receive it. Mark it in evidence. Defendant's Exhibit D in evidence.

(Whereupon the picture was received and marked Defendant's Exhibit D in evidence.)

Mr. Ezra: I have no further questions.

The Court: Cross-examination, Mr. Rivers?

Mr. Rivers: Yes.

Cross examination.

By Mr. Rivers:

Q. Mr. Hanington, you are a professional photographer?

[fol. 201] A. Yes.

Q. Commercial photographer?

A. Yes.

Q. With regard to the defendant's exhibits in evidence that you previously identified, were you paid for taking them?

A. The company was, sir.

Q. The company was paid for taking the photographs; is that correct?

A. Yes.

Q. Do you know how the company was paid or just how much they were paid?

A. I wouldn't know, sir.

Mr. Ezra: I have the check for this.

The Court: The Court assumes that a commercial photographer gets paid. He is not a charitable institution.

Q. Mr. Hanington, in addition to the company being paid for taking these photographs, were you paid to come in and testify today?

A. Yes, sir.

Q. And can you tell me who drafted the check to you today?

A. Mrs. Ginsberg.

[fol. 202] Q. Mrs. Ginsberg?

A. Sir, that wasn't to me personally.

Mr. Rivers: Would your Honor instruct the witness not to respond unless I ask him a question?

The Court: Try to answer the question.

The Witness: I would like to clear that up.

The Court: The check was not made to you personally?

The Witness: No, sir.

The Court: Who was the check made to?

The Witness: Drennan.

The Court: You are paid for your time?

The Witness: Yes. The company.

Q. Are you testifying that you have taken other photographs in stores and businesses; is that right, Mr. Hanington?

A. Yes, sir.

Q. Now, during the time that you took these other photographs in these stores, did you use the same type of equipment or other equipment?

A. Depending on what the job called for, sir.

Q. Do you remember visiting the store at 1507 Bellmore Avenue; is that right?

A. Yes, sir.

[fol. 203] Q. And do you recall the dimensions of the store?

A. They were not made, sir?

Q. Do you recall visually, not exactly, but visually, what the dimensions of that store were?

A. I couldn't say, sir.

Q. Did you tell me on my voir dire that you felt that this was a reasonably confined area?

A. It was, sir.

Q. Have you taken similar photographs in reasonably confined areas?

A. Yes, sir.

Q. Have you used other equipment such as a tilting back camera to take these photographs?

A. Speed Graphic, yes.

Q. You have done that; is that correct?
A. Yes.
Q. But on this occasion you didn't?
A. Right.

Mr. Rivers: No further questions.
The Court: Any questions, Mr. Ezra?
Mr. Ezra: Yes, your Honor.

Redirect examination.

By Mr. Ezra:

[fol. 204] Q. Were you told by anyone what type of equipment to bring to this store to take the photographs that you did take?

Mr. Rivers: Your Honor, I object.
The Court: I will let him answer it.

A. No, sir.
Q. Did I at any time, before meeting you in the store at the time you took these photographs, speak with you?

Mr. Rivers: Objection.

A. No, sir.

The Court: Let him answer it.

A. No, sir.
Q. I show you this check dated January 19, 1966 and ask you whether you recognize that check, sir?
A. It's made out to my company. But, I never saw it before, sir.
Q. Was that the charge that was made? Was the amount on that check the charge made by your company?

Mr. Rivers: I object.
Mr. Ezra: I have not finished the question yet.
The Court: Go ahead.

A. Yes, sir.

Q. Was that the charge that was made by your company [fol. 205] for the photographs that you took of this store on January 8th, 1966?

Mr. Rivers: Objection.

The Court: No. Let him answer it. The company got paid. It's been in evidence already.

Mr. Ezra: No, because he brought it up. He wanted to know who paid and were they paid and so on.

The Court: He brought up the question did he get paid to come today.

Mr. Ezra: Fine. I will ask him.

The Court: That was cleared up. The check was made to Drennan and not made to him.

Mr. Ezra: I don't know what he tried to imply.

The Court: I am the one who has to decide what he tried to imply.

Mr. Ezra: That is what I want to clear up.

The Court: Drennan got paid for his time for coming here today.

Mr. Ezra: He asked by whom was he paid.

The Court: He was paid by Mrs. Ginsberg.

Mr. Ezra: The question was what he tried to imply on the part of the question.

Mr. Rivers: I object to counsel. He has been testifying [fol. 206] for the last few minutes.

The Court: Let's not waste time. The man is in business. He is a doctor. He is a dentist. He comes to court and testifies. He uses up his time. It is not unusual for him to receive remuneration. Let's not make a big issue about it. Let's get down to the real issues of this case.

Mr. Ezra: I have no further questions.

The Court: I have a question, since you brought it up on your redirect. Now, nobody told you what kind of equipment to bring, did they?

The Witness: No, sir.

The Court: Didn't you tell me before or somebody said before, that Mr. Ezra is the one who directed where you

should take the pictures from and what pictures to take?

The Witness: Yes, sir.

Mr. Ezra: Did I tell you what type of equipment to use?

The Court: We went over that, Mr. Ezra. You asked him that.

Mr. Ezra: Yes. Of course. In order to aid the Court—

The Court: (Interposing) I got the answer, all right?

[fol. 207] Mr. Ezra: Yes. Very good, your Honor.

The Court: That is all.

Mr. Ezra: I have no further questions.

The Court: Step down.

(Whereupon the witness was excused.)

Mr. Ezra: I call Father Stowell. May I have a recess for a moment. I would like to call my office. I haven't been in touch with them.

The Court: You can have a recess for five minutes, Mr. Ezra.

(Whereupon there was a five minute recess.)

Reverend George L. Stowell, a witness on behalf of the Defendant, residing at 1692 Bellmore Avenue, North Bellmore, New York, having first been duly sworn, testified as follows:

Direct examination.

By Mr. Ezra:

Q. Father Stowell, will you tell us please what church you are connected with and what capacity?

A. I'm the Episcopal Pastor in North Bellmore, St. Marks Episcopal Church.

Q. For how long have you been connected with the [fol. 208] Episcopal Church in North Bellmore?

A. 1948.

Q. Were you connected elsewhere prior to that time in the same capacity, sir?

A. Yes. Clergy.

Q. Now, in the course of your Church duties and personally, have you had occasion to meet with Sam Ginsberg, the defendant in this case?

A. Yes.

Q. Are you acquainted, sir, with the fact that Sam Ginsberg operates a stationery store at 1507 Bellmore Avenue, Bellmore, New York?

A. Yes, I am.

Q. Have you had occasion to go into that store from time to time?

A. I go in it twice a day to get my morning and afternoon paper and other small items.

Q. Now, do you have a school connected with your church?

A. Well, I have a church school and I have various choir and instruction groups that meet on Saturday, of children.

Q. Now, have you and the children gone to the defendant's store from time to time in connection with the busi-
[fol. 209] ness conducted by the defendant there?

Mr. Rivers: I object, your Honor. It has no bearing on this case. The store is not on trial.

The Court: I will take the question. I will let him answer it and see where it leads to.

A. I have taken the young people up for lunch. In the course of a day, their day's activities, that lasts for weeks and times before that, but weekly, for the last four weeks, once a week.

Q. Can you tell us, Reverend, had you ever found that store to contain any material of any kind that is harmful to the children that you took into that store—

Mr. Rivers: (Interposing) I object.

The Court: Sustained.

Mr. Ezra: I respectfully except.

The Court: Now look, Counselor, so that we do not get in a long business, there are two charges here violating section 484 on October 18, 1965 and October 26, 1965 by the sale of certain items. Exhibits 2, 3, 4 and 5. These

are the items that we are concerned with. So far, this witness testified that he has taken children in there in the last four weeks. That is in the month of April and March of 1966. It is not relevant at all.

[fol. 210] Q. Do you know the length of time that the defendant has been conducting business in that store at 1507 Bellmore Avenue?

A. Over two years.

Q. Have you gone in there during the two years or more that he has conducted that store?

A. Yes.

Q. Have you purchased articles in that store over these two or two and a half years?

A. Yes, I have, sir.

Q. And during that time, have you come to know the defendant and his wife?

A. Yes. I know them well.

Q. Have you spoken to them, sir?

A. Yes. I often visit with them for a minute or two or three when I'm in the store. Of course, knowing so many other people, well—excuse me. This isn't an answer to the question. I'm sorry, Judge.

Q. Are you acquainted with other people who know the defendant?

A. Yes. Many people in the local community.

Q. Have you at any time observed this defendant selling material of any kind that is in your opinion harmful to minors?

[fol. 211] Mr. Rivers: Objection.

The Court: Sustained.

Mr. Ezra: Respectfully except.

Q. Will you tell us what your observations have been of this defendant and the conduct of his business during the time that you have been going into the store?

A. His language is always courteous and polite. His customer approach was pleasant and good. His handling of different age groups was good. All in all, he has dealt

with the public in such a way that would please a clergyman.

Q. From the time that you have come to know this defendant, have you formed an opinion, sir, as to the defendant's morality?

Mr. Rivers: I object.

The Court: Sustained. Counsel, to save time, all this witness can testify to is to what the defendant's reputation is for either truthfulness, morality or any of the other virtues of mankind. Not as to his own personal opinion.

Q. What can you tell us, Father, with reference to the defendant's reputation in the area?

The Court: He has not finished, Mr. Rivers. Finish [fol. 212] your question, Mr. Ezra. Reputation as to what, sir.

Mr. Ezra: As to morality.

Mr. Rivers: I object, sir. No proper foundation.

The Court: Let's save a little time. Reverend, or is your proper title Mr.? Which is it?

The Witness: My congregation calls me Father, never Mr. You call me what you want, Judge. First name, if need be. I don't care.

The Court: I get confused sometimes between the titles. Now, I understood that Reverend was not actually a title.

The Witness: No, it isn't, sir.

The Court: Actually, a person, if he is not a Bishop or Cardinal, is Mr. If he is not Mr., he is Father. But, whatever the custom is, I will address you, sir.

The Witness: The Congregation calls me Father.

The Court: Now, Father, have you discussed Mr. Ginsberg with anybody else in your community?

The Witness: Yes.

The Court: How many people?

The Witness: Well, possibly his neighboring store-[fol. 213] keepers.

The Court: Over a period of years?

The Witness: Over the period of time that he has been there.

The Court: As a result of your discussions with them, have they discussed his representation or his characteristics with respect to being a person of good moral character?

The Witness: Well, they simply said he is an honest, good man.

The Court: You have discussed it and they said he was an honest, good man?

The Witness: Yes. His reputation is good.

The Court: For honesty and virtue his reputation is good?

The Witness: Yes. We could have saved time if I could have told you this.

The Court: Unfortunately the law has peculiar ways of going about it. We are over that, Mr. Ezra.

By Mr. Ezra (continuing):

Q. Now, as to truthfulness, if we might ask the same things?

The Court: Have you discussed his reputation for truth-
[fol. 214] fulness in the community?

The Witness: Yes. He has a reputation.

The Court; Of being a truthful man?

The Witness: A truthful man and good citizen.

The Court: Thank you very much, Father.
Anything else, Mr. Ezra?

Mr. Ezra: Yes.

By Mr. Ezra (continuing):

Q. Are you acquainted with the area of Bellmore and of Merrick?

A. Yes, I am.

Q. How long have you been in that area?

A. I have been in the area since late 1946.

Q. Have you traveled through Merrick and through Bellmore during those years?

A. Yes. In the process of work and shopping throughout the whole area.

Q. Do you know where Woodbine Avenue is in Merrick?

A. Yes. My very best friend is at 21 Woodbine Avenue.

Q. Can you tell this Court, Father, whether there are any stationery stores in the immediate vicinity of 204 Woodbine Avenue, in Merrick?

[fol. 215] A. No. You see, I know 21. Just exactly how is 204 Woodbine Avenue from Merrick Avenue, now I would presume that it's within three blocks of Merrick Avenue, and if so, my answer to that is that in say ten minutes walk, there are plenty of stationery stores. If it's within three blocks of Merrick Avenue.

Q. Do you know whether those are stationery stores that are within a ten minute walk of 204 Woodbine Avenue?

A. I didn't say they were. I said if that 204 was within three blocks of Merrick Avenue. You see, I haven't gone up Woodbine Avenue examining the numbers.

Q. But, are there shopping centers?

A. Yes. There are shopping centers.

Q. That serve these Woodbine Avenue residents?

A. Yes. There is a long shopping street in Merrick which Woodbine Avenue people usually take, all the way from Camp Avenue to Sunrise Highway.

Q. Would that also take in Jerusalem and Bellmore Avenue, Father?

A. No. Jerusalem and Bellmore Avenue are entirely different shopping centers.

Q. Are there shopping centers at Newbridge Road and Camp Avenue?

[fol. 216] A. Yes.

Q. Now, do they have stationery stores there that sell magazines and newspapers?

A. Yes. I have been at stationery stores on the corner of Newbridge and Camp, on Jerusalem Avenue, at the cor-

ner of Bellmore Avenue. If what you want me to say is have I seen other stationery stores nearer to Woodbine Avenue than Sam's, yes, I have. Quite a few.

Q. Do those stores sell magazines and newspapers?

A. Yes.

Mr. Ezra: I have no further questions.

The Witness: I have one more statement that I would like to make, Judge.

The Court: Please keep it to yourself, sir.

The Witness: Okay, I will.

Cross-examination.

By Mr. Rivers:

Q. Father Stowell, I would like to show you People's Exhibit 2 in evidence and ask that you look at it. (Handed.) Do you want to look through that, Father?

A. Well, I will take your word for it, that it has what kind of material in it.

Q. I don't want to embarrass you.

[fol. 217] The Court: Look, Father, you are acquainted with the female form?

The Witness: Yes. I'm a married Episcopal Priest.

The Court: I think you are acquainted with the female form.

Q. Did you look through it?

A. Yes. I looked through it.

Q. But not meaning to embarrass you, I would like you to look at People's Exhibit 3 and ask you to look through it.

A. The same kind of magazine, yes, yes. The nude magazine types.

Q. And People's Exhibit 4.

A. Oh, well, this is obvious on the cover. I don't need to look at it.

The Court: Do you want to look through it at all, Father?

The Witness: I will take his word for it.

The Court: It is not a question of taking the District Attorney's word for it. He is going to ask you a question and he wants you to be prepared for the question.

[fol. 218] The Witness: Yes.

Q. People's Exhibit 5. (Handed.)

A. Yes. Same thing. They're all the same.

Q. Did you know that Mr. Ginsberg exhibited such magazines for sale?

A. No, I did not know.

Q. Did you know that Mr. Ginsberg in fact or it is alleged that Mr. Ginsberg sold such magazines to 15 year olds and 16 year olds?

A. Alleged, your Honor?

Mr. Ezra: I object to it, if the Court pleases. There is no such testimony in the record. "15 year olds and 16 year olds," means plural.

The Court: The only testimony in the record up to now is that which applies to a 16 year old. But, I think the question, in its form, is objectionable, Mr. Rivers. I think you can ask a hypothetical question based on an assumed state of facts is within the testimony in evidence.

Mr. Rivers: I am asking does the Father know that it is alleged that the defendant sold such material to a 16 year old?

A. I heard so last night for the first time that it was alleged that the defendant—it was the first time I heard it, [fol. 219] sir.

Q. Now, based upon your answer to the two previous questions, would your statement as to Mr. Ginsberg's reputation for morality in the community be the same now—knowing such things?

A. That is a catch question. Would you revise the question? Can I answer that in a different way?

The Court: You just answer it, Father, the best way you can.

Q. It calls for yes or no.

The Court: We won't limit him to yes or no. You answer it, Father.

A. If investigation showed that Sam had taken initiative of selling pictures like that to the 15 and 16 year olds, I would take a different opinion of him.

The Court: Thank you, Father.

Q. I would like to call your attention to page 27 of People's Exhibit 4 in evidence and ask you a question with respect to it.

The Court: Well, 56 and 57 are really one page.
Mr. Rivers: 56 and 57.
The Court: Do you want to show him this?
Mr. Rivers: Yes.
The Witness: That's very bad.
[fol. 220] The Court: Just a minute, Father.

Q. Now, Father, based upon your experience, being a Priest in the community since 1948 and being a Priest prior to that time and having experience with church schools and choirs and children, I would like to ask you whether or not you feel that such a picture first, would predominantly appeal to the prurient, shameful or morbid interest of a minor of 17 years old?

Mr. Ezra: I object, if the Court please.
The Court: On what ground, sir?
Mr. Ezra: He has not established him as an expert.
The Court: Well, let's review it. This witness—
Mr. Ezra: (Interposing) Nor is he a priest. I don't believe that he said that he was.
The Court: Just a minute, Mr. Ezra. With respect to the Episcopal Church—
The Witness: All of the Episcopalians are ordained priests, but you will find that there is a high and low.
The Court: (Continuing) As I was about to say, Father, that it is not out of the ordinary, Mr. Ezra, to refer to

Episcopal man of the gospel as priest and they call him [fol. 221] Father. Now, let's review the facts here.

Mr. Ezra: I did not know.

The Court: You brought this witness to the stand. This witness is a man of the cloth. He is a man of some maturity and experience. He has a church. He has a congregation. He has a school.

The Witness: Church school, not a day school.

The Court: You mean a religious school?

The Witness: Just a religious school.

The Court: As such, he is in contact with minors under 17 years of age. Now, in your religious school, Father, do you have any boys and girls of 14, 15, 16 years of age?

The Witness: Yes. A lot of them.

The Court: I think it is perfectly permissible to ask his opinion with respect to these exhibits, Mr. Ezra and the Court would be very interested in finding out his opinion.

Mr. Ezra: I respectfully except, your Honor.

The Witness: I consider a picture of this kind would encourage the immoral attitudes or prurient interest of over half the young people under 17. I didn't say all. Over half.

[fol. 222] By Mr. Rivers (continuing):

Q. Two other questions, Father. Would you consider that such a picture would be patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors?

A. Yes. I feel that—I myself, of course, went down to St. Barnabas, the Knights of Columbus group and gave them my blessing and okay in any way that might want to use my name or position in getting rid of such material as this.

Q. Would you consider that such material would be utterly without redeeming social importance for minors?

A. Yes, because I looked through it.

Mr. Ezra: I object to it, if the Court please, unless the statute is complied with to that.

The Court: He is asking him a question as to his opinion. He asked him a question. Let me ask you a question Father, so that we understand and we do not have any disagreement.

Now, you have seen this picture, right, Father?

The Witness: Yes. It's terrible.

[fol. 223] The Court: Now, I show you a picture, page 51 of People's Exhibit 5. Page 51 of People's Exhibit 5.

The Witness: That's terrible too.

The Court: Now, let me ask you, Father, so that we have no misunderstanding. Do you think these pictures, as shown in these magazines, have any social importance for children under 17 years of age?

The Witness: No.

The Court: Do you think they have any educational value for children under 17 years of age?

The Witness: No. I think they encourage them into occasions of sin.

The Court: Do you think that these pictures or this type of picture as shown to you on pages 56 and 57 of Exhibit 4 and page 51 of Exhibit number 5, which is Man to Man, are helpful at all in the biological education of children under 17 years of age?

The Witness: No.

The Court: Can you think, a man of your experience, can you think of any importance at all that these pictures may have from a social viewpoint with respect to the [fol. 224] upbringing and the training and wholesomeness of the children in the community?

The Witness: No. They have a degrading influence.

The Court: Thank you.

Cross examination.

By Mr. Rivers (continuing):

Q. Father, have you heard or did you hear that when confronted by a parent and a young six year old, whose 16 year old son had been sold those magazines, the defen-

dant was heard to say, "I'll sell them to anyone." and when asked whether or not anyone meant the six year old, the defendant was heard to say, "to anyone." Have you heard that?

A. I heard of that only in the newspapers.

The Court: Wait a minute, Father. Do you have an objection?

Mr. Ezra: Yes, your Honor. That is assuming a state of facts not in evidence. It is my understanding and my recollection of the testimony that when this woman went into the store, that she did not speak to this defendant. She spoke to someone else in the store and furthermore, that the six year old was not with her. She said that she— [fol. 225] The Court: I am going to sustain your objection on another ground. I do not see any connection here, Mr. Rivers.

Mr. Rivers: I am asking him has he heard that the defendant said this?

The Witness: Heard it only from the newspapers this morning when I read the paper. I read it just before I came in here.

The Court: Which paper?

The Witness: Newsday.

Q. Father, if he had said that, would your opinion be different or your statement be different as to his reputation, the defendant's reputation?

A. If he said that, I would feel that he was not a fine man, if I believed that he said that.

Q. Your opinion or statement as to his reputation would be different?

A. Well, I wouldn't make any statement as to his reputation. A priest will never make a statement against anyone else's reputation unless he feels it's good.

Mr. Rivers: That is all.

The Court: Mr. Ezra?

Redirect examination.

By Mr. Ezra:

[fol. 226] Q. Father, from what you have observed and from what you know of this defendant, do you believe that this defendant would make a statement such as Mr. Rivers attributed?

Mr. Rivers: I object to that.
The Court: Sustained.
Mr. Ezra: Respectfully except.

Q. Father, I show you this picture and ask you whether in your opinion that has any social importance to minors under the age of 17?

A. Well, in an art museum—

Mr. Rivers: (Interposing) I object to that. It is not in evidence.
The Court: Sustained.
Mr. Ezra: Respectfully except.
The Court: What are you excepting to? Is this picture in evidence?
Mr. Ezra: No, it is not. I intend to offer it in evidence.
The Court: Well then, offer it in the right way.
Mr. Ezra: I believe I am doing it in the right way. I am showing it to him first to find out his opinion, then I will offer it.
[fol. 227] The Court: Sustained. No, sir. If you want his opinion on something, it has to be something in evidence. If you want to put it in evidence, you go ahead and try or make the offer. But, you do not get his opinion on something in evidence first as to whether he thinks it is harmful, prurient, so on and so forth and then make up your mind whether you are going to put it in evidence. You are doing it backwards.
Mr. Ezra: May I have that, please? (Handed.)
The Court: That is not the issue here, Mr. Ezra. We went all over this before. That is not the issue here.

Mr. Ezra: The issue is are photographs of nudes harmful to minors in the sale of these—

The Court: (Interposing) No, it is not the issue at all.

Mr. Ezra: The sale of these things to minors?

The Court: The issue here, Mr. Ezra, is was the sale of Exhibits 2, 3, 4 and 5, are they in violation of Section 484(h). Now, in order for them to be in violation of 484(h), they have got to meet certain conditions that are set up by [fol. 228] the State Legislature, one of which, perhaps, is nudity and nudity is defined as showing of the female breast below the nipple.

Now, they do that.

Mr. Ezra: And with no—

The Court: Wait a minute. You asked me the issue. I am clarifying it. Then, having a representation or showing of nudity, then do they meet certain conditions set up in the statute? One, do they predominantly appeal to the prurient, shameful and morbid interest of minors under 17 years of age? If they meet that condition, then we go on to two. Two, is, are they offensive according to the prevailing—patently offensive, which means obviously offensive to the prevailing standard of the adult community as a whole? We went all over that before, with respect to what is suitable material for minors. To make it short form, are Exhibits 2, 3, 4 and 5, suitable for minors under 17 years of age. Minors of high school and junior high school group. Three, do they have any social importance? Legislature put that condition down because obviously, if a picture is contained in a scientific work, in a study of physiology, biology or any related social subjects or it is con- [fol. 229] tained in the study of an art class or other things that have some social importance, then, this is an exception to this statute. But, if the exhibits actually and in essence amount to a merchandising of sex for the purpose of making money and for the purpose of appealing to the prurient and morbid interest of impressionable children of high school and junior high school age, then it comes within the statute. Whether Reader's Digest or Time or Look or even the Metropolitan Museum of Art sells brochures containing

nudes, has nothing to do with the issue in this case. We are not trying obscene or pornography. We are trying section 484(h).

Now, have I made myself clear, Mr. Ezra?

Mr. Ezra: Not to me. I am sorry. I know that your Honor has been most explicit, certainly. But, I believe that your Honor has shown much latitude to the Prosecution. I wish that your Honor would show it to me in the sense that I may very well say to your Honor that I may not know about how to offer these things in evidence. You have been most helpful to the Defense. Help me—I mean to the Prosecution, so that this defendant may get a proper trial.

[fol. 230] The Court: Now, Mr. Ezra, the Court is going to admonish you. That is the second or third time you made that innuendo. Mr. Ezra, what I am trying to do, which I do not seem to get across to you is that I am trying to keep this trial within the bounds of this issue here.

If I stop you from wandering all over the face of the earth with all kinds of evidence that have nothing to do with the issue, then you plead you are not getting a fair trial. This is not so.

Mr. Ezra: I did not plead that.

The Court: I am telling you now that what is published in another magazine has nothing to do with the issue in this case.

Mr. Ezra: Well, your Honor, may I then say this—

Mr. Rivers: (Interposing) I would just like to take exception to the remarks made by Counsel that your Honor is being helpful to the Prosecution. The Prosecution is conducting the case according to the statute. That is exactly what I was trying to say when we had the argument before when the People rested.

The Court: I have already ruled four or five times, Mr. [fol. 231] Ezra and you keep trying to bring it in. What is contained in another magazine, the Saturday Evening Post, Look, Time, The New York Times, what they may have published last year or last week, has nothing to do with this case.

Mr. Ezra: Well, your Honor, there was another case recently, only last week.

The Court: On this section? On Playboy, which was prosecuted right here in this Court, before Judge Samenga? Wait a minute. Has there been a decision in that case?

Mr. Ezra: No, your Honor.

The Court: I will not listen to anything that has been—

Mr. Rivers: (Interposing) I have some cases on the Advance Sheet, which were just decided. This case that I refer to is April, 1966 by the Supreme Court in New York Special Term. The language that I use in my argument—the exact same language used by the Judge—

The Court: What is the name of the case?

Mr. Rivers: Bookcase Inc. vs. Broderick, he was the Commissioner of Police then, 49 Misc. 2d 355. The language at 357 used by Judge Tilzer. "In view of the clear [fol. 232] statements in the relevant Court of Appeals, United States Supreme Court case refuting his argument," and then referred to the argument with regard—maybe I better read it from the beginning.

"Plaintiff argues that obscenity is the sole test of constitutionality here and there cannot be variable standards of obscenity, one applying to adults, the other applying to minors. The book in question was held not to be, in Larkin vs. Putnum's Sons 14 N.Y. 2d 399. These statutes are said to be unconstitutional because their prohibitions of the sale of books is based upon the age of the purchaser whether or not the book is obscene. This argument was not urged in defense of the prior action. The People vs. Bookcase, supra. In view of the clear statements in the relevant Court of Appeals and United States Supreme Court cases refuting this argument, the Court wonders that plaintiffs now urge it as the sole basis for the requested constitutionality declaration. A reading of Butler vs. Michigan at 352 U.S. 380, and Jacobellis vs. Ohio 378 U.S. 184; People vs. Bookcase Inc. 14 N.Y. 2d 409; People against Kahan at 15 N.Y. 2d 311, leads irresistibly to the conclusion that a statute which prohibits the sale to minors of matter which

[fol. 233] is not obscene in the hands of adults, but which is deemed harmful to children, would, always assuming it was carefully drawn, be constitutional. Whether justification is sought be redefining obscenity in terms of its impact on the young so that there are in effect two standards of obscenity or whether it is done without regard to the traditional legal concept, "Obscenity," the State has a legitimate interest in preventing the dissemination of material determined harmful to children. Contrary to plaintiffs assertions, the Federal Constitution and specifically, the First Amendment thereof, does not secure to children the same almost absolute right assured to adults, to judge and determine for themselves what they may read and what they should reject." He cites the Court of Appeals. Judge Fuld. The same citation that I have given to the Court in the People vs. Kahan, at page 312. "The plaintiffs constitutional right to make a profit may not take precedence over the legitimate or exigent power of the state to protect the welfare of its youth. A democratic society rests, for its continuance, upon the healthy, well-rounded group of young [fol. 234] people into full maturity as of citizens, with all that it implies. It may secure this against impeding restraints and dangers within a broad range of selection," citing Prince vs. Massachusetts at 321 U. S. 158.

The Court: Thank you, Mr. Rivers. All right, Mr. Ezra, you may proceed.

Mr. Ezra: I ask for your Honor's help.

The Court: In what respect?

Mr. Ezra: With respect of marking these things into evidence. A copy of the section of the New York Times. That is at the advertisement section of the New York Times. Section 2 of March 27, 1966 and specifically page 9 thereon.

The Court: Have you shown it to Mr. Rivers yet?

Mr. Ezra: I don't know.

The Court: You mean page two and page nine.

Mr. Ezra: Page nine.

The Court: Show this to Mr. Rivers. What is the purpose of the offering, Mr. Ezra?

Mr. Ezra: The purpose of the offering is to show that this is a nude. This appears in the New York Times and that the statute does not in any way distinguish between nudes that may be described or thought of as art and nudes [fol. 235] that may be as depicted in the magazines which are in question here.

The Court: All right. Now, Mr. Ezra, just so that you will have a record, even though I deem this picture completely immaterial, irrelevant, incompetent in this case, but just so that you have a record, I will let you offer it in evidence, but I will tell you again that I do not think it is competent evidence in this case because this case is not a case in which we are trying to determine what is or is not art.

As a matter of fact, I asked you once before and you refused to answer me. I will ask you again, as long as you are raising the question of art. You look at the pictures in Exhibits 2, 3, 4 and 5. Is it your contention, Mr. Ezra, that those photographs are art?

Mr. Ezra: Those photographs no more art than this is.

The Court: Are they art in your opinion, Mr. Ezra?

Mr. Ezra: Your Honor, I answered it. I am not an expert. To me they are the same art that this one is.

The Court: In other words, you say the photographs [fol. 236] in Exhibits 2, 3, 4, and 5 are of the same artistic level or basis as this painting by Lucas Kranash in 1472, which is in the Stajm Museum; is that your contention?

Mr. Ezra: That is my contention. My contention is that the statute makes no differentiation.

Mr. Rivers: Your Honor, I object to the admission to this on the grounds of the same citation that I just read. Whether or not Mr. Ezra is of the opinion that this is art or is not art is not binding. As a matter of fact, if he feels, whether the exhibit is in evidence are not binding. The statute is set up as standard. This is—

The Court: (Interposing) I change my position on that, Mr. Ezra. I do not think there is any point in unduly cluttering up the record. I will not take it in evidence, Mr. Ezra.

Mr. Ezra: May we have it marked for identification?

The Court: Yes. Defendant's Exhibit E for identification.

(Whereupon Section 2 of the New York Times was marked Defendant's Exhibit E for identification.)

By Mr. Ezra (continuing redirect examination):

[fol. 237] Q. Father, do you deem Reader's Digest a magazine fit for children to read?

Mr. Rivers: Objection.

The Court: Now, Counselor, you have had your direct examination. We have had cross on this. Now, you are on redirect. Technically speaking, Counsel, your redirect should be directed to matters brought out on the cross. You are bringing in new evidence again.

Mr. Ezra: Now, your Honor, he has questioned—

The Court: (Interposing) Are you applying to the Court for permission to resume a direct examination?

Mr. Ezra: I am so applying. Yes, your Honor.

Mr. Rivers: I oppose that motion.

The Court: No. I am going to let him bring it in, if he anything that is relevant.

Mr. Ezra: If not, we will mark it for identification as we did the others.

The Court: If you have anything that is relevant or competent. I wish we would stop wasting time in this court. I think I have ruled not only once, but I have ruled four times that what is contained in other magazines or other [fol. 238] publications has nothing to do with the issues in this case.

Mr. Ezra: If we can have a concession by the District Attorney to that effect and if he will concede that other magazines and other publications, newspapers and the like contain photographs of nudes, then I will—we can deem them marked and go further.

The Court: Do you want to make any concessions?

Mr. Rivers: I concede that magazines such as Reader's Digest and the article that you were about to put in contain photographs of nudes—might contain photographs of nudes, but that they have no bearing on this case.

Mr. Ezra: All right. I will take that concession, your Honor.

The Court: This is what I have been saying all along. All day yesterday and today.

Mr. Ezra: I am sorry if I did not understand it, your Honor.

The Court: That is what I have been trying to say.

By Mr. Ezra (continuing):

Q. Now, have you at any time, Reverend, heard the de-
[fol. 239] fendant, Mr. Ginsberg, speak to anyone in a harsh manner?

A. No.

Mr. Rivers: I object, your Honor.

The Court: Sustained. What has this got to do with the issue in this case?

Mr. Ezra: Didn't he ask him, your Honor, whether—if the defendant spoke to Mrs. Corey and said to her, "I'll sell to whoever I want to sell. It's none of your business," whether he would consider him to be a good person?

The Court: Mr. Ezra, let me point out to you what a man's character is or is not can be proven in a certain accepted way by reputation evidence. Now, we have already got the good Father's testimony to the effect that he had discussed Mr. Ginsberg with other people of the community and that he was a man of good moral character and that he was truthful and honest. We got that testimony. Then on cross-examination in response to questions by Mr. Rivers, the good Father said, well, if he had known that Mr. Ginsberg was selling this type of magazine with those types of picture in it, that he might change that opinion.

[fol. 240] Mr. Ezra: I do not believe that was his opinion. He said if he offered—

The Court: Do you want me to have the record read?

Mr. Ezra: Your Honor, we have done that before.

The Court: Well, we will do it again. We won't get in what you believe and what I said. The best way is what the record says.

Mr. Ezra: He said—I do not believe that he heard it correctly, that if he took the initiative of offering it to minors.

The Court: Mr. Reporter, go back to the cross-examination of Father Stowell.

Mr. Rivers: Your Honor, I concede if he took the initiative. Your Honor, I still object to the question on the grounds that whether or not the Father heard him speak in harsh tones on a particular day is not probative. It has no probative force.

Mr. Ezra: On any day.

The Court: Let's take it. Did you ever hear him talk harshly to anyone?

The Witness: No, Judge.

By Mr. Ezra: (Continuing):

[fol. 241] Q. Did you ever hear him say to any customer, "I will sell anything I want here to whoever I want?"

The Court: This is sustained.

Mr. Ezra: I respectfully except.

The Court: You have your exception.

Mr. Ezra: I have no further questions.

The Court: Any questions?

Mr. Rivers: Nothing.

The Court: Father, thank you very much. It has been a pleasure to meet you.

The Witness: It has been a pleasure to meet you, sir.

(Whereupon the witness was excused.)

The Court: Do you have any further witnesses, Mr. Ezra?

Mr. Ezra: Yes, I do, your Honor.

The Court: At this time, we will recess for lunch and reconvene at 2:00.

LUNCHEON RECESS

The Court: Are the People ready?
Mr. Rivers: Yes.
The Court: Is the defendant ready?
Mr. Ezra: Yes.
The Court: Will you continue, Mr. Ezra, please?
Mr. Ezra: Mr. Ginsberg.

[fol. 242] SAM GINSBERG, the Defendant herein, residing at 1679 Hannington Avenue, Wantagh, Long Island, New York, after being duly sworn, testified as follows:

Direct examination.

By Mr. Ezra:

Q. Mr. Ginsberg, you are the defendant in this proceeding?
A. Yes.
Q. And what is your business or occupation?
A. Running the establishment of candy store, stationery and luncheonette.
Q. At what address?
A. 1507 Bellmore Avenue, North Bellmore.
Q. How long have you owned that store?
A. Two years and four months.
Q. Now, did you open that store or did you purchase it from someone else?
A. I purchased it from someone else.

The Court: Speak up, will you Mr. Ginsberg? I want to hear you.
The Witness: I'm sorry.
The Court: It's all right.

Q. Is that the only business that you conduct?

A. Yes, sir.

[fol. 243] Q. Is your sole income from the conduction of this business, sir?

A. Yes, sir.

Q. Other than yourself, do you have anyone else that runs this store with you?

A. My wife, sir.

Q. And is she in court today?

A. Yes, sir.

Q. Now, as a result of both you and your wife being in the court today, is your store opened today or is it closed?

A. Closed, sir.

Q. Now, in connection with your business, do you sell newspapers and magazines?

A. I didn't hear the question, sir.

Q. In connection with your business, do you sell newspapers and magazines?

A. Yes, sir.

Q. And if you can, will you tell us approximately how many types of magazines you sell?

A. There must be 175 to 200 types of magazines on the stand.

Q. Now, in connection with the magazines that you sell, do you print any of these magazines?

A. No, sir.

[fol. 244] Q. Do you publish any of them?

A. No, sir.

Q. Do you take any of the photographs that appear in any of those magazines?

A. No, sir.

Q. From whom do you purchase the magazines that you sell?

A. G.N.S. News Company.

Q. Where are they located, if you know?

A. They're on Front Street in Westbury, Long Island.

Q. Now, the magazines that you purchase, sir, that you put out on your shelves or your bookcases and the ones

that you sell, do you pick them out specifically and order them?

A. No, sir.

Q. What is the method that is used with respect to the magazines that you have on display in your store?

A. They send them in automatically.

Q. When you say, "They send them in," please tell us who you mean?

A. The G.N.S. News Company sends them automatically twice a week.

Q. Do you have a choice as to the magazines that this G and S News Service sends to you?

[fol. 245] A. No, sir.

Q. Now, I show you this batch of papers and ask you what they represent?

A. Well, these represent the different magazines that they send in twice a week.

Q. Are these the forms used by the G and S News Service in listing the magazines that they deliver to you twice a week?

A. Yes, sir.

Q. Now, are these papers which you have in front of you now, used by you and carried by you, in the regular course of your business?

A. I didn't hear that. Can you repeat that again?

Q. Are these papers, which you have before you now listing the magazines which are sent to you by G and S News Service, papers which you keep in the ordinary course of your business?

A. Yes.

Q. And do those papers in front of you now, have the dates when those deliveries are made to you by this G and S News Service?

A. Yes.

Q. Now, in addition to the names of the magazines which are listed there, are there any prices listed of those maga-

[fol. 246] zines, sir?

A. Yes.

Q. And are those prices at cost to you or are those the selling prices of the magazines?

A. Those are at the cost to me.

Q. Now, in connection with these magazines, do you have any arrangement with the publisher concerning the return of left over magazines?

Mr. Rivers: I object, your Honor.

The Court: On what ground?

Mr. Rivers: The arrangement with the publisher. The arrangement with the publishers is hearsay. Any arrangement that he has is hearsay. He must testify as to discussions between himself and the publisher outside of the issues in this case—

The Court: I will take it subject to connection, connecting it up to some issue in this case, because this whole line of testimony so far is irrelevant and immaterial as far as the issues are concerned, but I will permit you to go ahead with the understanding that there will be some connection with the issues in the case.

Q. Do you have such an arrangement, sir?

A. Yes, we do.

[fol. 247] Q. Will you tell us what that arrangement is?

Mr. Rivers: I object to this. This is self serving. It can't serve any purpose.

The Court: I do not see what difference it makes what his arrangements are with the publishers about the return of magazines. If you have some specific reason, feeling that it fits in with some other theory, that you have with the case, I will be glad to listen, Mr. Ezra. But, what difference does it make if he returns all or only half of them or what?

Mr. Ezra: Well, of course, your Honor, all of these magazines are subject to the whims of the people that buy them. There are some that are left over and I wanted to get to the question of whether from time to time these magazines have been sold or have been returned.

The Court: I do not see what it has to do with the issues, Mr. Ezra, any more than the question that you went into. I did not stop you. Any more than the question of whether or not he has to take them from the publisher. This is a matter of contract that he made. It has nothing to do with the issues in this case. Plenty of candy stores or stationery stores do not have the magazines. If they [fol. 248] have to take them, they do not have to take the line.

Mr. Ezra: I think your Honor is assuming something.

The Court: That is the way it is. If you have something, I will take it in connection. What he has to return with the publishers has no bearing on this case.

Mr. Ezra: I have already brought out he has no choice with respect to magazines.

The Court: Actually, hasn't he got a choice of not buying the magazines at all or not dealing with this publisher?

Mr. Ezra: There is no distributor—Is there any other distributor?

The Court: I do not see that that is relevant at all. There is no compulsion on the part of any storekeeper to buy material from a supplier or particular supplier, if a storekeeper does not like the type of material the supplier has, he has a perfect right not to buy from that supplier.

There is no compulsion. Are you trying to tell me that a storekeeper is compelled to buy from one supplier?

Mr. Ezra: Correct.

[fol. 249] The Court: Only from one supplier in the whole field?

Mr. Ezra: Correct. In this area.

The Court: How do you account for the fact that some stores that you go into, stationery stores that have magazines and books and everything else, have no girly magazines on their shelves.

Mr. Ezra: I do not think your Honor knows that as a fact. I think that your Honor is mistaken because they send them in whether you want them or not.

The Court: All right. You can testify as to that if you want to.

Mr. Ezra: I cannot testify, but I can have testimony—

The Court: Let me say this. As long as you do not know, the Court knows it as a fact. I do know it as a fact. I go into stationery stores and I can name a couple.

Mr. Ezra: Your Honor does not know whether they have them behind the counter.

The Court: They are not on display.

Mr. Ezra: That is a different story, your Honor.

[fol. 250] By Mr. Ezra (continuing):

Q. How many people in the area of where you have your store supply magazines and newspapers to you?

The Court: Mr. Ezra, I still do not see the relevancy of this.

Mr. Ezra: I thought that your Honor raised that. I was going to go into that as to explain it and bring it out.

The Court: All right. I will give you the opportunity. But, unless you show some connection with the charge here, I will have to strike it.

I do not see what relevancy it has. Go ahead, Mr. Ezra.

A. We have the Daily News, Crescent Newspapers and G and S News Publishing. News Weekly and Long Island Home News. Bellmore Life.

Q. With respect to the magazines that you sell and display, is there any company or distributor other than G and S that supplies magazines in your area?

A. No, sir.

Q. Now, coming to the question at issue here, Mr. Ginsberg, do you now know this young man, Richard Lance Corey, who came into your store and purchased some magazines?

[fol. 251] Mr. Rivers: Objection. Whether he knows him or not.

The Court: I will sustain the objection on the grounds of its form.

Mr. Ezra: All right, your Honor.

Q. Were you in Court when Richard Lance Corey testified in connection with the information against you here and which you are on trial for?

A. Yes.

Q. Now, when for the first time did you know this young man as Lance Corey?

A. The first time when I was served with the summons.

Q. Prior to that?

A. Or the warrant.

Q. Prior to that time did you know this young man's name to be "Lance"?

A. No.

Q. Did he ever introduce himself to you as Lance?

A. No. Never.

Q. Did you ever call him Lance?

A. No.

Q. How many times in all, approximately, from the 18th day of October, 1965 to the time when a warrant was served on you, as you say, had you seen this boy in your store?

[fol. 252] A. I assume twice I quess.

Q. Now, after you were served with the warrant and you were arrested, how many times did you see him in the store up to the present time?

A. He came in at least two or three times a week.

Q. After the arrest was made?

A. Right.

Q. Did he come in alone or did he come in the company with others?

A. He would come in with a friend and sometimes he would come in by himself.

Q. Did he make any purchases from you after the 26th day of October, 1965?

A. Yes.

Q. What was the nature of those purchases?

A. Well, first he would buy a vanilla soda or he would walk over to a book rack and look at it or buy a box of Cracker Jacks.

Q. Now, at any time before October 26, 1965, did this young man purchase from you any girly books?

A. No.

Q. Did he purchase from you knowingly or otherwise the books, "Sir" and "Mr. Annual" on October 18, 1965?

[fol. 253] A. No. I never saw him take them.

Q. Did he ever purchase any books from you of that nature prior to October 18, 1965?

A. No.

Q. Was there ever a time, Mr. Ginsberg, when this young man Richard Lance Corey came to you prior to October 18, 1965 to say to you or—I will withdraw that. To tell you what his age was?

A. No.

Q. Did he ever, at any time prior to October 18, 1965, ever say to you, "You should not sell books of this kind to me?"

A. No, sir.

Q. "Or to people my age?"

A. No, sir.

Q. Did he ever tell you at any time prior to October 18, 1965 for you to remove books of the type of Sir and Mr. Annual, from your racks and put them behind your counter?

A. No, sir.

Q. Now, do you recall the 26th day of October, 1965?

A. Yes, sir.

Q. On that day, did you see Richard Lance Corey come into your store?

[fol. 254] A. Yes, sir.

The Court: What date is this?

Mr. Ezra: October 26th, your Honor.

The Court: I thought you said the 18th.

Mr. Ezra: No, we have already finished with the 18th. He said he never saw this boy before at that time insofar as purchasing any books.

The Court: I am sorry. We are talking about October 26th now.

Mr. Ezra: That is correct.

Q. Did you see this young man Richard Lance Corey in your store on the 26th day of October, 1965?

A. Yes, sir.

Q. Do you recall at approximately what time he came into your store?

A. It was early evening. It might have been between 5, 5:15, 5:30. I don't know exactly.

Q. At the time that this young man came into your store, where were you?

A. I was behind the counter, toward the register, sir.

Q. Was there anyone else in your store at the time that this young man came in on October 26, 1965?

A. Yes, sir.

Q. Who was that?

[fol. 255] A. Well, it was a gentleman who sat on a counter and now when he one of the arresting officers or one of the detectives that appeared here.

Q. At the time that he was sitting at that counter on October 26th, at the time that this young man came into the store, did this gentleman that was sitting at the counter identify himself to you as a police officer?

A. No, sir.

Q. Did you know then that he was a police officer?

A. No, sir.

Q. Did this person have anything to eat or drink while he was there?

A. He had a cup of coffee.

Q. And during that time that this person had his cup of coffee and the young man came in, where were you?

A. I was still behind the counter, busy with cigarettes, putting them away, I remember and some cakes that had to be assorted for the evening trade.

Q. Now, while this gentleman was at the counter, whom we now identify as Detective Sergeant Groh, did you see what the young man was doing in your store?

A. No. He, oh, he was at the magazine rack.

Q. Did you know or see what magazines he was looking [fol. 256] at or what magazines he took?

A. No, sir.

Q. How long in all was the boy at the magazine counter that early evening?

A. It might have been just a few minutes.

Q. And during all of this time, did you leave your place behind the counter?

A. No, sir.

Q. Now, did there come a time when this young man did make some selection of magazines?

A. Yes, sir.

Q. Did he show you the magazines that he took?

A. No, sir.

Q. Will you tell us exactly what took place from the time that this young man came into the store until the time he left it?

A. When he entered the store, he selected his magazines. He walked over between the gum counter and the candy counter which is a space of about 18 or 19 inches. It's a small little vestibule. He called my name out. He said, "It's $1.20, Sam." He game me the exact change. By the time I came back and I put the money in the register, he was already gone, sir.

[fol. 257] Q. Did you see what he took for that $1.20?

A. He had his magazines under the armpit, sir.

Q. When you say, "Under the armpit," exactly illustrate for us what you mean?

A. Can I stand up?

The Court: Yes.

A. He had them this way and he handed me the money, sir.

The Court: Let the record show that the witness indicates that the magazines were folded under his right armpit and he handed him the money with his left hand.

The Witness: I don't know if it was the left hand—I imagine it was the left hand.

The Court: It might have been the other armpit. Is that what you are trying to say?

The Witness: If you walk in this way, yes. It was the left hand.

The Court: What was the left hand?

The Witness: He gave me the money with the left hand.

Q. When he had these magazines under his armpit, were they opened flat out or were they folded?

A. They were folded, sir.

[fol. 258] Q. Were you able to see the names or the type of magazines that he had chosen?

A. No, sir.

Q. Did he tell you what magazines he had chosen?

A. No, sir.

Q. At any time before he gave you this money, did he say to you, "Sam, how much for these magazines?"

A. No, sir.

Q. Incidentally, was the price of the magazines clearly printed on those magazine covers?

A. I guess they all are.

Q. Now, did he tell you how many magazines he had taken?

A. He handed me the money and he said two.

Q. Now, tell us please—

A. (Interposing) I'm sorry. He just gave me the $1.20, I remember. He said, "Here's $1.20." If he mentioned two or not, I don't remember.

Q. Now, were the actions of this boy in giving you $1.20 and saying I took magazines unusual for your place of business?

Mr. Rivers: Objection.

The Court: Of course you have been leading this witness right along, Mr. Ezra and I have been permitting it. I will [fol. 259] sustain the objection.

Q. Now, how many different magazines that had the selling price of sixty cents on their covers, did you have on your magazine rack?

A. You can have from 10 to 15 at times.

Q. Now, can you tell us from looking at the papers in front of you exactly which magazines sell for sixty cents in your place of business?

Mr. Rivers: Your Honor, I am going to object here. These papers are not in evidence. They are not marked for identification. They are not being used to refresh a recollection that has been exhausted. The question was asked with regard to how many magazines sell for sixty cents and the witness answered straight forward 10 to 15. What is the purpose of these? I object to the question.

The Court: I am going to sustain it. If he knows what magazines sell for, why doesn't he says so.

Do you know what magazines sell for sixty cents in your store?

The Witness: Yes.

The Court: What are they?

[fol. 260] The Witness: Scientific American, Audio, Popular Boating, Basketball, Gold and Gold Digest, Road and Track. I think there is either Car and Driver or just Car Model. Actually, those are more or less standards. Then they come out with something new that will come out for sixty cents.

The Court: How many magazines had you said you had of different types, 75 to 200?

The Witness: Sometimes we get 250. Sometimes the comics alone, they run 150. If you want to consider that. Then you got 150 other types that are possible.

The Court: The whole 200 of them are sixty cents? They have other prices?

The Witness: Yes. They run from twelve cents, the comics are twelve cents, that run to $1.75 for House Beautiful and House Decorating.

The Court: A magazine that sells for $1.75 costs you more than sixty cents.

The Witness: Of course.

The Court: If a customer took a magazine that sells for $1.75 and gave you sixty cents for it, you would be losing money, would you not?

The Witness: Yes.

[fol. 261] By Mr. Ezra (continuing):

Q. Now, to your knowledge, has a person ever taken a magazine that is $1.75 and only given you sixty cents?

Mr. Rivers: I object.

The Court: To his knowledge has a person ever taken a $1.75 magazine and only given him sixty cents? I will permit it for whatever value it has. If that were the case, the person is not liable to tell him, is he, Mr. Ezra?

Mr. Ezra: That is correct.

The Court: So whether he knew about it or not has very little probative value.

Q. Will you please answer?

The Court: Answer the question.

The Witness: No, sir.

The Court: You do not know of anybody taking a $1.75 magazine and giving you sixty cents for it?

The Witness: They never did. They are very honorable.

The Court: You never had shoplifting in your store?

The Witness: No.

The Court: Nobody ever stole magazines off your coun-
[fol. 262] ter?

The Witness: I never found anybody.

The Court: Nobody ever stole candy from the counter?

The Witness: No. I take inventory and I have found the inventory to be right. We have nice people there.

The Court: Go ahead.

Q. With reference to Magazines and candies, when people come in and buy magazines and candies, they always show you what they buy?

Mr. Rivers: I object to that. We are not testing as to whether or not they always show what they buy, nor are we testing the element of candy.

The Court: I will let the question stand.

The Witness: No.

Q. What is usual in your store, in connection with the purchase and paying for newspapers, magazines and other articles—

Mr. Rivers: I object to, "what is usual." Not probative. This is a criminal case. What is usual is not probative.

[fol. 263] The Court: I think the important issue is what happened on this day, the 18th or the 26th. What happened on other occasions is not governing here, is it?

Mr. Ezra: It is not governing, but it could give the Court—

The Court: Interposing) It may bear on the question of credibility to a certain extent. I will allow the question. You answer it, Mr. Ginsberg.

The Witness: They will come over and say they will hand me a dollar and say Sam, here's a quarter or let me have a quarter. Here's a dollar and that's it.

Q. Do you inquire of those people what they took?

A. No. These people, well, it seems that these people that we found out that it would be more embarrassing to ask them or question them.

Mr. Rivers: Objection.

The Court: Mr. Ginsberg, you are telling me you never looked at what people take in order to determine what is coming to you?

The Witness: Excuse me, your Honor. It seems that [fol. 264] of course we don't do it with everybody, I admit

that. But, there's quite a few that we have that the people are regular customers and that's more or less like local procedure.

The Court: You told me that Lance Corey was not a regular customer? You said you never saw him before October 26.

Mr. Ezra: He didn't say that, your Honor. I do not want to get into a question again of what the testimony shows.

The Court: Maybe I am wrong.

The Witness: No. He was in there. I have noticed him since I have been here and he has had these—

The Court: Didn't you say before—but I may be wrong, but didn't you say that on October 18, he did not buy any magazines your store?

The Witness: No. He never bought magazines as far as I can remember. I never saw him buy any magazines.

The Court: He did not buy any magazines on October 18?

The Witness: No.

[fol. 265] The Court: Did he ever buy any magazines before October 18?

The Witness: None.

The Court: How many times has he come in from October 26th?

The Witness: He used to come in several times, have a drink, like I say, a piece of candy, a box of Cracker Jacks and walk out.

The Court: How many times would you say he came into your store prior to October 26th?

The Witness: Off hand, he came in in the summertime, I remember quite a number of times and he would come in occasionally.

The Court: In all these times he never bought a magazine?

The Witness: I don't remember him ever buying a magazine. I don't remember him buying a magazine.

The Court: So that on October 26th, when he came up to you, he had these magazines under his armpit and he said,

"Here is $1.20, Sam," and you took his word for it?

The Witness: Automatically I took it and that's it.

[fol. 266] By Mr. Ezra (continuing):

Q. Where did you place the money that you took from Mr. Corey for those magazines?

A. In the register, sir.

Q. Where is the register?

A. It's practically in the center of the store.

Q. When you say, "In the center of the store," do you mean in the aisle?

A. Behind the counter, sir.

Q. Is that where the back bar is?

A. Yes, sir.

Q. Has that cash register been there ever since you bought the store?

A. When we purchased the store?

Q. Did you purchase that cash register with the store?

A. Yes, sir.

Q. Was that cash register ever moved from its place from behind the back bar?

A. Never.

Q. Now, may I ask, if the Court please, for Defendant's Exhibit C and D? I believe they are the photographs.

Now, I show you Defendant's Exhibit D in evidence and [fol. 267] ask you whether you can point out to the Court where the cash register is on that photograph?

A. (Indicating)

The Court: It shows on the photograph, Counsel. I can see it.

Mr. Ezra: Can we have the witness place a "C" right above that to identify where the cash register is?

The Court: It is off the photograph. You do not have to have the witness to do a thing. The Court can look at the register and see where it is.

Mr. Ezra: At any time, sir, was that cash register removed from that place where it is shown on that picture?

Mr. Rivers: I object to this. It is leading again.

The Court: He has been leading right along. What do you mean by, "At any time?" The dates we are concerned with are October 18th—

Mr. Ezra: (Interposing) From the time that he bought the store.

The Court: Make it definite.

Q. From the time that you bought this store, up until the present time, has that cash register been anywhere else in [fol. 268] your premises other than where it is shown in that photograph?

Mr. Rivers: Objection.

The Court: What grounds?

Mr. Rivers: On the grounds it is leading. On the grounds it is self serving.

The Court: Let him answer it. Overruled.

A. No, sir.

The Court: It's always been in that position?

The Witness: Yes.

Q. Has it ever been on the gum counter?

The Court: Mr. Ezra, he said it has never been removed. So, it has not been in the aisle; has not been in the store window. Let's not waste time with redundant.

Mr. Ezra: I ask it because of the police officer's testimony.

The Court: Why argue with me. He said it was not in another position. Then you say I get impatient. Sure I get impatient with redundancy.

Q. When you went to the cash register to put this money in that the young man Corey had given you, where was Detective Sergeant Groh?

Mr. Rivers: I object. There is no showing here that this witness knew Detective Sergeant Groh.

[fol. 269] Q. The person whom we identified.

The Court: We understand that he says there was a man sitting at the counter who we later came to know as Detective Sergeant Groh. What stool was he sitting on?

The Witness: Practically sitting, oh, right near the register, sir.

The Court: In front of the register?

The Witness: Yes.

The Court: He was sitting in front of the register; is that right?

The Witness: Yes.

Q. Now, at any time—I will withdraw that. During all of the time that this Detective Sergeant Groh was sitting on the stool, in which direction was he facing?

A. He was facing me. He was facing the back bar.

Q. What part of Detective Sergeant Groh's body was facing the magazine rack?

The Court: Mr. Ezra, when?

Q. During the time that he was in the store?

The Court: During the time that he was in the store?

Mr. Ezra: Correct.

[fol. 270] The Court: Are you asking what part of his body was facing the magazine rack?

Mr. Ezra: Correct, your Honor.

The Court: Haven't we had testimony here, Mr. Ezra, that this man was putting cigarettes away and he had his back to the magazine rack and that he had his back to the counter.

Mr. Ezra: He did not say that.

The Court: Where is your cigarette counter? Where do you put cigarettes away?

The Witness: We have cigarettes right here, sir.

The Court: That is right along the cash register?

The Witness: Yes.

The Court: When you put cigarettes away, what do you do?

The Witness: We take them out and put them up.

The Court: Do you face the cigarettes?
The Witness: Yes.
The Court: Your back would be to the counter?
The Witness: Yes.
The Court: Your back would be to the magazine
[fol. 271] The Witness: Yes.
The Court: That is the point you brought out before. If he had his back to the magazine rack, he could not see what Groh was doing either, could he? That is simple.

By Mr. Ezra (continuing):

Q. Can you show us on that photograph where Richard Lance Corey was standing when he gave you the money for the magazines?
A. You would have to have—this is not the photograph.

The Court: You cannot show it on that photograph, can you?
The Witness: No.

Q. I show you Defendant's Exhibit A in evidence and ask you whether that photograph shows the place where Richard Lance Corey was standing when he gave you the money?
A. He was standing—
Q. Does it show the place where he was standing?
A. Yes.
Q. Will you point out to us please, where Richard Lance Corey was standing when he gave you the money?
A. He was standing right in here.
[fol. 272] Q. Show it to his Honor.

The Court: Mark it with an "S". Where did you mark it? If he was standing in this areaway or passageway—
The Witness: I put it as a little further down.
The Court: He was not up against the back bar. That is where you got it.
The Witness: No.

The Court: Where you put the "S", he was up against the back bar. Strike out the "S". It is sufficiently explicit for the witness to say, according to his testimony, that Lance Corey was standing in the passageway between the soda fountain counter and the other counter.

Mr. Ezra. Okay.

Q. Looking again at Defendant's Exhibit A in evidence, does—can you tell us whether there was anything on the counter to the right of where Lieutenant or Detective Sergeant Groh was sitting?

A. You have different types of mints on the counter. Then you have this plastic paints that they use for models, painting models. Then there is gum. Then there is a pole of stockings that we sell.

The Court: Mr. Ginsberg, do you see this stuff that you [fol. 273] have on the counter on the end? Was that there at the time on October 18th and 26th?

The Witness: Yes.

The Court: Was it there on the 26th?

The Witness: Yes.

Q. Now, with reference to the pole on which you display packaged stockings for sale, how tall is that, sir?

A. That leads up to the ceiling. I guess it might be 12 to 14 feet.

Q. From the floor?

A. No. From the counter.

Q. If you know, sir, could a person sitting at the counter in the place where Detective Sergeant Groh was sitting, see a person who was paying you money in the position that Richard Lance Corey was standing at the time?

Mr. Rivers: Objection.

The Court: Sustained.

Q. Now, after you received the money from Richard Lance Corey what did he do?

A. He left the premises.

Q. While he was there, did anyone else come into the store?

[fol. 274] A. No, sir.

Q. At any time, did you see a Detective Anderson in the store while this boy was there?

Mr. Rivers: Objection, your Honor. There is no showing that he knows Detective Anderson or that he knew any detective, as a matter of fact.

The Court: I will sustain it. There is nothing in the evidence so far that would connect Detective Anderson by name with this defendant. You asked him if anybody else came in the store and he said, "No, sir."

Q. Now, how long—I will withdraw that. Where was Detective Sergeant Groh at the time that Richard Lance Corey left your store?

A. He was still sitting at the counter.

Q. In which direction was he then facing?

A. He was facing the back bar.

Q. Did there come a time when Detective Sergeant Groh left your store?

A. Yes, sir.

Q. About how long after Richard Corey left the store did Detective Sergeant Groh leave the store?

A. Several minutes, I guess.

Q. Did Detective Sergeant Groh say anything to you [fol. 275] before he left the store?

A. No, sir.

Q. Did he go to the magazine rack at all before he left the store?

A. No, sir.

Q. After Detective Sergeant Groh left the store, did he come back into the store that day with Richard Corey?

A. No, sir.

Q. Did he come back into the store with anyone else that day?

A. No, sir.

Q. When was the next time that you saw Detective Sergeant Groh?

A. When I was served with the summons, with the warrant.

Q. And approximately how long after this particular day of October 26th, 1965 was it that they came to you with that warrant they call it?

A. I heard it was the 28th when they served me with the warrant. As far as the exact date, I don't exactly remember.

Q. At any time on that day of October 26th, 1965, did Detective Sergeant Groh in words or substance ask you if you had sold these magazines Escapade, Man to Man, [fol. 276] to Richard Lance Corey?

A. No, sir.

Q. When was the first time that it came to your attention that you were charged with selling these magazines to Richard Lance Corey?

A. When they served me with the warrant and I read it and I asked them what was what. He told me—he told it to me at the time he served me with the warrant.

Q. On that day of October 26, 1965 did you knowingly sell the magazines Escapade and Man to Man to Richard Lance Corey?

Mr. Rivers: Objection.

The Court: Sustained.

Mr. Ezra: Respectfully except, your Honor.

Q. Did you know the names of the magazines that Richard Lance Corey purchased from you on that day?

Mr. Rivers: Objection.

The Court: Sustained. Look, Counsel, he has already testified he did not see them. They were wrapped up under his arm. That is his testimony. The Court will make a decision as to whether or not he knew the names of the magazines based on all the evidence.

[fol. 277] Q. At any time before and I apologize to the Court if I have gone over this matter—

The Court: Do not worry about apologizing to me. All I am trying to avoid is redundancy.

Mr. Ezra: I say I apologize now, because I do not know whether I went into this phase that I am going into now.

The Court: Go ahead. We will find out.

Q. At any time before October 26, 1965, did you see Mrs. Corey in your store, the Mrs. Corey who testified here yesterday?

Mr. Rivers: Object. He answered this question at the beginning of direct examination.

The Court: No, he did not.

Mr. Rivers: I think he did.

The Court: Not that I remember. I have been waiting to hear about Mrs. Corey. I have a note.

Mr. Ezra: If I did, I—

The Court: (Interposing) You saw Mrs. Corey here yesterday?

The Witness: Yes, I did.

The Court: Did you ever see her before in court?

The Witness: She came in one time.

[fol. 278] The Court: When was that?

The Witness: Before all this happened.

The Court: It was before the detective was there, wasn't it?

The Witness: Yes.

The Court: Now, how long before the detective was there?

The Witness: I guess it must have been several days before or what.

The Court: Now, tell me when Mrs. Corey came in the store—I am not taking your witness away from you, but I do not want any leading questions.

Mr. Ezra: I appreciate that, your Honor.

The Court: Several days before October 26th, when she came into the store, did you have a conversation with her?

The Witness: No, sir.

The Court: You never talked to her?

The Witness: She spoke to me first.

The Court: She spoke to you?

The Witness: Yes.

The Court: What did she say to you and what did you say to her?

The Witness: She came in, in a very loud voice and said, "I don't want you to sell any of these books to my [fol. 279] son." At the time we were quite busy. The counter was quite full. I said, "I don't know who your son is Ma'am." I got busy and I walked away because I had some work to do. That is the gist of it and that was the end of it.

The Court: That was all she said to you?

The Witness: "I don't want you to sell any of these books to my son. I don't like the magazines or books that you have in here."

The Court: Did she tell you her name?

The Witness: No. I didn't know her name. I didn't know her son at the time. I didn't know who her son was.

The Court: Did she have a discussion with your wife?

The Witness: Pardon me?

The Court: Did she have a discussion with your wife at that time?

The Witness: I heard sounds and I heard and she was really shouting and I had some work to do by the ice box toward the end, I remember. When I came back, it was all petered out, I guess and that was it.

The Court: She had left?

[fol. 280] The Witness: I just saw her leaving the store. She was walking out.

The Court: So, you are telling me now that she came in and said to you I don't want you selling any of these maga-

zines to my son and she did not tell you her name? She did not tell you her son's name or anything else about her son?

The Witness: No. She didn't name her son's name at all.

The Court: Is that all?

The Witness: She just said, "I don't want you to sell any of these books to my son when he comes in the store."

The Court: You did not know what her son's name was?

The Witness: I said, "I don't know what your son's name is Ma'am."

—By Mr. Ezra (continuing):

Q. Did she come in with her son?

A. No, sir.

Q. Did she come in with magazines and show you magazines?

A. No, sir.

Q. Did she tell you what kind of magazines she did not [fol. 281] want you to sell to her son?

Mr. Rivers: I object. I think this is leading.

Mr. Ezra: Your Honor, how could it be asked?

The Court: All you had to do is ask what did you say and what did she say? It is as simple as that, Mr. Ezra.

Mr. Ezra: How do you get to the point of whether she brought magazines in?

The Court: I am not going to give a course in the art of examining on direct, but let me say this to you, that any question posed by an examiner on direct which suggests the answer is leading and is improper. So that it is your function on direct to ask what happened. It is up to him to say what happened.

If you recall, the Court said to him, "What did she say to you and what did you say to her?" Did anything else happen there?

Q. Did she show you anything at the time she came in?

A. No, sir.

The Court: After I get through, you go right back to the leading questions. Go ahead, Mr. Ezra.

[fol. 282] Mr. Ezra: I appreciate your Honor telling me what the law is.

The Court: I have given you a great deal of latitude.

Mr. Ezra: I am sure that your Honor wants the facts here.

The Court: Well, I have been trying to find them out.

Q. Did Mrs. Corey have anything in her hand when she came and spoke to you?

A. No, sir.

Mr. Ezra: May I examine my notes?

The Court: Sure, go ahead.

Q. At the time that Mrs. Corey came into the store, did she come in with anyone else?

A. No.

Q. At any time did the father of this boy, if you know who he is, come into your store?

A. No.

Q. At any time on the 26th day of October, 1965, did Richard Lance Corey hand you two one dollar bills in payment of the magazines that he took?

A. Can you repeat that?

Q. On October 26th, 1965 did Richard Lance Corey hand [fol. 283] you two one dollar bills when he made the purchase of the magazines?

A. He made a purchase of magazines with $1.20, sir. Exact change.

Q. Did Richard Lance Corey at any time ask you how much for the magazines that he bought that day?

Mr. Rivers: I object, your Honor. This has been asked and answered.

Mr. Ezra: I do not believe so.

The Court: Let him ask it. It is leading, but go ahead. Did Lance Corey ever ask you how much?

The Witness: No. He handed me the money.

The Court: He testified already, Mr. Ezra, that he came up there with the magazines under his arm and said, "Sam, here's $1.20. Good-bye," and walked out.

Mr. Ezra: You may examine, sir.

Cross examination.

By Mr. Rivers:

Q. Now, Mr. Ginsberg, you have stated 175, 200 types of magazines for display for sale in your store; is that right?

A. Right.

[fol. 284] Q. These magazines vary in price; is that correct?

A. Correct.

Q. Some sell for as much as $1.75; is that correct?

A. Right.

Q. Would this be the highest priced magazine exposed for sale?

A. There might be $2.00 or more. There might be three or five. It's all according to what they send in.

Q. Let me ask you this. What is the highest priced magazine in your store exposed for sale in the magazine rack?

A. We had one for $2.00 already.

Q. One for $2.00?

A. Yes.

Q. How many magazines would you say sell for in excess of sixty cents?

A. Might be 10 to 15 types.

Q. 10 to 15 types sell for more than sixty cents?

A. Yes.

Q. I think, if I recall, how many magazines in your store sell for sixty cents and you began to name magazines?

[fol. 285] A. Yes.

Q. This is based upon your recollection of the magazines?

A. From memory.

Q. The answer that you gave on direct examination with regard to the price and types of magazines were based upon your recollection; is that right?

A. Right.

Q. As I recall, you named as one of the magazines Car Model, which sells for sixty cents; is that correct?

A. I think it's Road and Track. It's either Car or Car Model. One of them sells for 50 and one of them sells for 60, I think.

Q. You are not certain then as to the price of magazines; is that right?

A. I am, but it's a Car, Car Model. I think Car Model sells for 50 and Car sells for 60.

Q. Now, with regard to the sizes of these magazines. You are familiar with the magazines Escapade, Sir, Mr. Annual and Man to Man; is that correct?

A. Yes.

Q. Now, these magazines have a specific size and shape; [fol. 286] is that right?

A. More or less, yes.

Q. As a matter of fact, they are all similar in size and shape; is that right?

A. Right.

Q. Now, with regard to Car and Car Model, the magazines such as these, are they not shaped differently and are they not larger than the magazines such as Escapade, Sir, Man to Man and Mr. Annual?

A. Not too much of a difference, sir.

Q. There is in fact a difference; is that right?

A. Very little.

Q. Now, Mr. Ginsberg, are you telling me, the Court, that Car Model is not a longer and wider magazine than these?

A. I think that these might be a little lengthier than the others.

Mr. Rivers: Your Honor, may I have a moment, please?

The Court: Yes. There will be a short recess.

(Whereupon there was a short recess.)

(The witness, still under oath, returns to the stand.)

[fol. 287] By Mr. Rivers:

Q. Mr. Ginsberg, these magazines that you stated Lance Corey had under his arm, were they folded together or folded separately?

A. Folded together.

Q. So that it would appear from the folding—would I be correct in stating that it would appear from the folding of the magazines that there would only appear to be one magazine under his arm?

A. No, there were two.

Q. Listen to my question. Would you agree that if two magazines were folded together evenly, it would appear that there was only one magazine?

A. But he handed me $1.20.

Q. I'm asking you a question. Would you agree with that statement?

A. Would you repeat it, sir?

Q. Would you agree with the statement that if two magazines were folded as I have them in front of me, even and together, that they would appear to be one magazine?

Mr. Ezra: I object, if the Court please. It calls for an operation of the witness' mind and it is argumentative.

[fol. 288] Mr. Rivers: Based upon his observation and this is cross-examination, your Honor.

The Court: Let him answer it, if he can.

A. Can I answer this in my own way, sir?

Q. Can you answer yes or no?

A. When he handed me—

Q. (Interposing) Mr. Ginsberg, can you answer yes or no to the question I just asked you?

A. There were two.

Mr. Rivers: I ask that it be stricken out.

The Court: Let it stand.

Q. Mr. Ginsberg, did you hear the question? If two magazines were folded so that they were folded evenly together and placed under a person's arm, would it appear to be one magazine?

Mr. Ezra: I object. It has been asked and answered.

Mr. Rivers: It has not been answered.

The Court: He answered the question. Let's move on.

Q. Describe, Mr. Ginsberg, how the two magazines were folded under his arm?

A. They were folded under his armpit.

[fol. 289] Q. Were they evenly folded?

A. I don't remember.

Q. Was one magazine sticking out from the other?

A. No. They were practically together, but you could see that there were two.

Q. You could see that there were two, even though they were folded together?

A. When two magazines are folded together—

Mr. Rivers: (Interposing) Your Honor, may I ask the witness to please answer my questions?

A. I'm sorry, sir.

The Court: Mr. Ginsberg, listen to the question and answer the question as best you can, please.

Q. Even though these magazines were folded together, you could see that there were two magazines; is that right?

A. Right, sir.

Q. Let me ask you this, Mr. Ginsberg. Are you aware of the content of Escapade, Sir, and Man to Man?

A. Yes, sir.

Q. Are you aware of the content of Mr. Annual?

[fol. 290] A. Yes, sir.

Q. Can you tell me and the Court, can you tell the Court what that content is?

A. It's a magazine Call Girl Annual or whatever you mentioned. It's a name of a magazine.

Q. Mr. Ginsberg, do you understand the word "content"?

A. What it contains.

Q. Can you tell me first what the content of the magazine Escapade is?

A. It's photographs of girls and stories.

Q. Photographs of girls and stories. Can you tell me with regard to the photographs of the girls, how they appear in the magazine?

A. They appear in nude fashions. They appear in different types of dress and different types of appearance.

Q. Would you say predominantly that the magazine contains pictures of female nudes?

A. Yes and no.

The Court: Well, it's either one way or the other. Do they contain pictures of female naked women or nudes or whatever you want to call them?

[fol. 291] Mr. Ezra: Excuse me, your Honor. I believe that the Court should take judicial notice of the fact that there is no nude in that entire—in any one of the entire magazines, if we say nude and consider the entire body.

The Court: We are talking about nudes, Mr. Ezra, in accordance with the wording of the statute. The wording of the statute, if I remember, I am now speaking from memory, says it is a nude or nudity. If the female breast is exposed with the nipple showing; if the buttocks are shown uncovered or the pubic area is shown uncovered.

I think that is sufficient.

Mr. Ezra: A form of nudity, your Honor.

The Court: A form of nudity as set forth.

Mr. Ezra: Then, I have no objection to the question. But the word "nudity"—

Mr. Rivers: Let me withdraw the question, Mr. Ginsberg. Mr. Ezra, I am sorry.

Q. Mr. Ginsberg, would you say that the magazine Escapade contains pictures of females with the entire breast exposed?

A. Yes, they are.

Q. Would you say that the magazine Escapade contains [fol. 292] pictures of females with their entire buttocks exposed?

Mr. Ezra: Your Honor, may I object at this time? The magazines are in evidence and they speak for themselves.

The Court: No. This is a different question entirely, Mr. Ezra. Let's not get into it. This is a different question entirely, Mr. Ezra. I know the magazines speak for themselves, but we are testing something else right now.

The Witness: Would you repeat the question, sir?

Mr. Rivers: Mr. Reporter, would you please read the question back.

(Question read back.)

A. Yes.

Q. Would you say that in some instances it contains pictures of females with the pelvic area exposed.

A. That I have never seen, sir.

Q. You have not seen this?

A. No.

Q. Let me withdraw that. Were portions of the pelvic area exposed?

A. No, I have never seen that.

[fol. 293] Mr. Rivers: May I have People's Exhibit 4 in evidence?

The Court: Before you get this, may I interrupt your cross-examination for a moment because there is an important question the Court wants to ask. I want you to just answer something. I want to clarify it in my mind, Mr. Ginsberg.

I believe you said on direct examination conducted by Mr. Ezra, that when Lance Corey came up to you on the 26th of October, 1965, that he had these magazines, two magazines folded or under his right armpit; is that correct?

The Witness: Yes.

The Court: Now, will you show me again the position of the magazines? Stand up. Where he had them and how he had them arranged. (Indicating) He had them tight under his arm, folded, four ways that way?

The Witness: Well, he just had them folded, as far as I can remember.

The Court: How many times did he have them folded?

[fol. 294] The Witness: I think they were just once.

The Court: They were folded over once and he had them under his arm?

The Witness: It might have been twice.

The Court: It might have been twice and he had it under his armpit?

The Witness: Yes and he handed me $1.20. Like I say, I walked back to the register and by the time I came back, he was gone.

The Court: Did he have his right arm pressed against his body?

The Witness: He had it in such a way you could just see the type of them. Like I explained to the District Attorney, you—I couldn't say it was one or two, but when he handed me $1.20, I thought that was the purchase.

The Court: Let the record show that he demonstrated that he had the magazines folded under his right arm, with his right arm tightly against his body; is that correct, Mr. Ginsberg?

The Witness: Yes.

The Court: Now, you may look at People's Exhibit 4. (Handed.)

[fol. 295] By Mr. Rivers (continuing):

Q. I show you People's Exhibit 4 and ask you whether or not portions of the pelvic area of the nude on the cover is not shown?

A. Can I ask—

The Court: Do you understand what, "pelvic area," is?

The Witness: Now, is the pelvic down below here or would you call it into this part? (Indicating.)

The Court: You would call it into that part down below there, would be the pelvic area.

The Witness: Yes.

Q. Is your answer to the pelvic area yes, Mr. Ginsberg?

A. Yes.

Q. Thank you, Mr. Ginsberg. With respect to the magazine Sir, were you aware on the 26th of October and the 18th day of October, as to the content of the magazine, sir?

A. No.

Q. You were not aware of the content of the magazine Sir?

A. I don't read it, sir, so I don't know the content.

[fol. 296] Q. But you were aware of the content of the magazine Escapade?

A. Since you showed it to me, I am aware of it.

Q. Mr. Ginsberg, did you not answer before I showed you the magazine that you were aware of the content of the magazine Escapade?

A. In regard to what question did you ask me on Escapade?

Q. About four questions ago, I asked you if you knew the content of the magazine Escapade and you answered with, "Yes."

A. Yes.

Q. Do you read the magazine Escapade?

A. No.

Q. But you are aware of the content of the magazine?

A. Yes.

Q. You have a—you had several magazines, 175 to 200 different varieties of magazines in your store; is that correct?

A. That's right.

Q. During that period of time were you aware of the content of the magazines in your store?

[fol. 297] A. Yes.

Q. Was Sir not a magazine in your store on that date?

A. Yes.

Q. Were you aware of the content of the magazine Sir on that date?

A. No, sir.

The Court: We had an intermission of four or five minutes. Before the intermission, you testified as to the magazine Escapade. During that intermission, did you have a conversation with Mr. Ezra?

The Witness: No, sir.

Q. With regard to the magazine Man to Man, is that a magazine in your store on October 26, 1965?

A. Yes, sir.

Q. And how about October 18, 1965?

A. That, I don't remember, sir.

Q. You don't remember whether this was a magazine on October 18, 1965?

A. If it was on the rack, I don't remember. I can't remember all the magazines on the rack, sir.

Q. But on October 18, 1965, you had 175 to 200 different varieties of magazines in your store; is that not right?

[fol. 298] A. Right.

Q. You remember that?

A. Right.

Q. You remember on October 18th, 1965 that Richard Corey or Lance Corey came into your store and ordered a vanilla ice cream; is that right?

Mr. Ezra: I object to that. There is no such testimony.

The Court: Read that question, Mr. Reporter.

(Question read back.)

Mr. Rivers: I withdraw the question.

Q. You are aware of the fact that on October 18th, 1965 that Lance Corey did not purchase any books in your store?

A. That's right.

Q. Is that correct?

A. That's right, sir.

Q. You remember that?

A. Right.

Q. And that prior to October 18, 1965 that he did not purchase books in your store?

A. No.

Q. But you are not aware whether Man to Man is a [fol. 299] magazine on display?

A. No, I can't remember.

Q. How about the magazine Mr. Annual. Was that a magazine in your store on that date?

A. I can't remember that, sir, if it's there or not, the types of magazines we have.

Q. How about October 26, 1965, was Man to Man a magazine in your store on that date?

A. October 26th?

Q. Yes.

A. Well, since he claimed he purchased it, it probably was there, sir, if he says he purchased it. I don't know. I can't remember.

Q. How about Mr. Annual on that date, was that a magazine in your store on that date?

A. I don't remember what magazines we would have exactly, names or that matter, sir.

Q. You do not remember the names? You stated that these magazines are ordered from G and S Newsdealers; is that right?

A. Right, sir.

Q. Did you receive a slip indicating the numbers of magazines and the price thereof which are delivered to your store; is that right?

[fol. 300] A. Right, sir.

Q. Do you have—withdrawn. As one of the methods of conducting this type of business, do you from time to time review these slips?

A. Yes. We check them when they come in, sir.

Q. How often do you check them?

A. Well, when we receive our bundles of magazines we check them according to what they send in and I put them up on the racks.

Q. How often do you receive bundles of magazines?

A. We receive them twice a week, sir.

Q. So that you check slips twice a week; is that correct?

A. Right, sir.

Q. Are you aware of the time between the 18th day of October and the 26th day of October; how many days is that?

A. Eight days.

Q. Can you tell me of your own knowledge whether or not on the 18th day of October or thereabouts, you received an order from G and S News Company?

A. Offhand—I know we got out magazines on Tuesdays and Fridays. The 18th, I don't know what day it was, [fol. 301] sir.

Q. Can you tell me what time these magazines are usually delivered?

A. Well, it's between 11 and 1. It's all according to how the truck driver gets around with his route, I imagine. We get them between 11 and 1:00.

Q. They are delivered on Friday and Tuesday of each week; is that right?

A. Usually, unless something is delivered.

Q. Would you have any independent recollection as to the magazines delivered to you on the 15th day of October?

A. Offhand, I can't remember that.

Q. If I told you that was a Friday, would you have any recollection as to that?

A. Not that far back.

Q. Would you have anything, notes, bills, that would refresh your recollection as to the deliveries on that date?

A. Well, usually, we don't hold—

Q. (Interposing) Yes or no.

A. No, sir.

Q. If I showed you these bills, would they refresh your recollection as to the date the 15th is?

[fol. 302] A. Is that October 15th?

Q. October 15th.

A. Well, there is no 15th, but there is a 14th here.

Q. What deliveries did you receive on the 14th?

A. Right here.

Q. Can you tell me whether or not you received a delivery of the magazine Sir on the 14th?

A. Yes. Sir was five copies.

Q. Did you receive a delivery of the magazine Escapade on the 14th?

A. I don't see any here, sir.

Q. Did you receive a delivery of the magazine Man to Man on the 14th?

A. No.

Q. Did you receive a delivery of the magazine Mr. Annual on the 14th?

A. No, sir.

Q. Do you have any independent recollection as to the magazines that you received on the 26th day of October, 1965?

A. No, I don't.

Q. Would you have any independent recollection as to those magazines, if I told you the 26th day of October, was a Tuesday?

[fol. 303] A. No.

Q. Do you have any slips or order blanks there or forms which would refresh your recollection as to deliveries on that date?

A. I will look it up. There is nothing in here up to the 26th.

The Court: What do you have before the 26th?

The Witness: Wait. I didn't notice this part. Yes. Here, the 26th.

Q. Can you tell us with regard to the 26th day of October, 1965 whether you received any deliveries of the magazine Escapade?

A. No, there is nothing in here.

Q. How about the magazine Sir?

A. No. Nothing here.

Q. The magazine Man to Man?

A. Nothing.

Q. Mr. Annual?

A. No. There is nothing here.

Q. Mr. Ginsberg, what was the delivery date prior to the 26th day of October?

A. That would be—that would be the 22nd.

Q. Have you got a sales slip for the 22nd day of October?

A. Is it the 22nd?

[fol. 304] Q. Yes.

A. What date is October 26th?

Q. Tuesday.

A. That would be the 29th.

Q. No. The 22nd. The delivery prior.

A. Well, I have the 21st.

Q. Let me ask you questions with regard to that. Do you have any independent recollection of the deliveries on that date?

A. No. I could look it up as far as the slip.

Q. Did you have any deliveries on the 22nd of the magazine Escapade?

Mr. Ezra: Your Honor, he said the 21st. The question is now directed to the 22nd.

Mr. Rivers: I am sorry. The 21st.

A. No.

Q. How about the magazine Sir?

A. I don't see anything.

Q. Man to Man?

A. Yes. Four copies.

The Court: When did you get four copies of Man to Man?

The Witness: 21st.

Q. How about Mr. Annual?

A. No, there is nothing here.

[fol. 305] Q. Let me ask you this, Mr. Ginsberg; rather than go through the other bills there. When these magazines are delivered to you by the dealer, do you place them on the shelf?

A. Yes, sir.

Q. Do they come packed or wrapped in some way?

A. They come in a—some sort of a steel, metal binder which we have to clip open.

Q. You remove them and place them individually on the shelf?

A. Yes.

Q. Each magazine, does it have an allotted place on the shelf?

A. No, it's all according to where you have room for them, you try to get them all together.

Q. Let me ask you this, Mr. Ginsberg. Would you take Escapade and put it with Sports Illustrated?

A. Sometimes, we have to.

Q. You would do that?

A. Pardon me?

Q. You would do that; is that right?

A. Pardon me?

Q. Take Escapade and place it on the shelf with Sports Illustrated?

A. Not exactly. Most of the time we can put them in the [fol. 306] rack. But, sometimes your racks are full.

Q. Would you say then that each magazine has an allotted place in your rack?

A. More or less, yes.

Q. Let me ask you this, now. In ordering these magazines, do you, from time to time, look through these racks to determine whether or not they are empty in order to make orders?

A. We get so many of them.

Q. Who makes the orders, Mr. Ginsberg?

A. G and S News Company sends them in automatically.

Q. Automatically?

A. Automatically.

Q. Had you ever sent these orders back to the company?

A. We send them back every Tuesday.

Q. You send back every Tuesday?

A. Because what happens is this. We get them filled up with the order and in order to clean out the rack for another shipment to come in, we wouldn't have room to put

the others in, so we have to clean out whatever we have to put in a new shipment.

Q. But, you have not ever, as a matter of fact, taken these type magazines off the rack completely and sent [fol. 307] them back?

A. Yes, I have.

Q. You stripped the rack of them?

A. Sometimes we do.

Q. I am asking you about you.

A. Yes.

Q. For what purpose, Mr. Ginsberg?

A. To make room for other stuff that comes in.

Q. Make room for other magazines?

A. Or if they are old and have been standing on the shelf.

Q. That is, in other words, to get an up to date magazine of the same type.

A. I don't know what they sent in. They could be sending in any type of magazine.

Q. You do not have any idea of what they are sending in?

A. No. We don't know.

Q. Answer this for the Court, Mr. Ginsberg. You are aware of the fact that you deal or have on your shelves what is known commonly as "girly" magazines?

A. Girly magazines?

Q. Magazines of female nudes?

A. Yes.

Q. You are aware of the fact that these things are in [fol. 308] your store, right?

A. Right.

Q. There comes a time, during the course of your conducting a business that these type magazines become depleted from your shelf; is that correct?

A. They never do.

Q. That a certain publication, such as Escapade, runs out; is that right?

A. Yes.

Q. So that you order more to fill in; is that right?

A. We don't order. We don't know what they're sending in.

Q. Or more delivered; is that right and you place them back on the shelf; is that correct?

A. It's possible, yes.

Q. So that can we—is it fair to assume, Mr. Ginsberg or would it be unfair to assume that these magazines are sold in the course of your business?

A. Yes. They are.

Q. They are sold in the course of your business?

A. Yes.

Q. Now, let me ask you this. How many persons operate that business other than yourself?

A. My wife and myself.

[fol. 309] Q. Now, on most occasions, are you in the store alone or is your wife there helping you?

A. My wife works until 1 or 2:00. It's all according to how business is, but she leaves in the afternoon for the children.

Q. But, you are there from that time on; is that right?

A. Yes.

Q. So you would say you put most of the hours in; is that correct?

A. Yes.

Q. So, during the course of business—

A. (Interposing) Pardon me. I also have a boy to come in to work.

Q. Your son?

A. No. A young man that helps me at night, clean up.

Q. Does he sell also across the counter?

A. No. He just cleans.

Q. What is the young man's name?

A. Raymond Sebowl. (phonetic.)

Q. Sebowl?

A. Yes.

Q. How long has the young man been working there?

A. About two years or so.

[fol. 310] Q. Two years he has been working there?

A. A little over a year, maybe.

Q. How often does he come in?

A. He comes in from seven to nine, seven to eight-thirty.

Q. You are telling the Court that Mr. Raymond Sebowl has been working there for over a year; is that right, Mr. Ginsberg?

A. Well over a year, yes. Close to two years, maybe. Over a year, I think.

Q. Now, Mr. Ginsberg, in the course of conducting your business, you sold these magazines; have you not?

A. Yes.

Q. As a matter of fact, upon selling these magazines, you have not inquired of the person how old they were, have you?

A. Yes. There are times I ask them or if I see somebody reading any of the girly magazines, I tell them to move away from the rack and get somewheres else. When I have the time and am not that busy.

Q. Then, as a matter of fact—withdrawn. You say when you have the time and are not that busy you tell them to move away from the rack; is that right?

A. Yes.

Q. But as a matter of course and the magazine is sold, [fol. 311] you will inquire of the person's age; is that right, if the person comes to you to pay you the money, you will inquire of their age; is that correct?

A. That's correct.

Q. Suppose you tell the Court, Mr. Ginsberg, if the magazines that were sold to Lance Corey that date were folded and under his arms, how would you have any idea what type magazines he was buying?

A. He gave me the $1.20. He could have had anything. He could have had Road and Track. He could have had House Beautiful.

Q. He could have had anything?

A. He could have had any magazine.

Q. So, as a matter of course, you do not inquire of the age when they are buying these magazines?

A. Except when you're very busy.

Q. As a matter of course, when a young lady pays for magazines, you do not inquire as to their age; is that correct?

A. I do at times. At this time, maybe I didn't. When you're busy and tired at times, you can't do all that.

Q. Now, Mr. Ginsberg, do you recall that on the 18th day of October, Lance Corey did not come into your store; is that right?

[fol. 312] A. That's right, sir.

Q. But yet, when I asked you what day the 18th day of October was, you could not recall what day it was, could you?

A. That's right.

Q. Do you have a busy business, Mr. Corey?

A. Pardon me?

Q. You have a busy type business? You have a turnover type business and sometimes there is a crowd there; is that right?

A. Right.

Q. As you said, sometimes you are busy; is that right?

A. Right.

Q. So really, there is no opportunity on your part to observe an entire eight or ten hour day, to observe who is or who is not in your store; is that right?

A. Right.

Q. But you told the Court that on October 26th, you recall the exact seat in which Detective Groh was sitting, the exact service he got and how long he remained in the seat; is that not correct?

Mr. Ezra: I object, if the Court please. First of all, I object to the shouting by the Assistant District Attorney. [fol. 313] Secondly, I object to the classification of this witness' testimony when he says, "You know exactly where he was sitting." His testimony was that he was sitting about the center of the—

The Court: (Interposing) Do not refresh my recollection, Mr. Ezra. I know what he testified to. Your objection is overruled.

Mr. Ezra: Respectfully except, your Honor.

Q. You did not know Detective—

A. (Interposing) Can I answer that question, sir?

The Court: Did you withdraw that question or are you asking a new one? Which is it?

Mr. Rivers: No, I would like to have an answer.

The Court: Mr. Reporter, read the question, please.

(Question read back.)

The Witness: Can I answer it now?

The Court: Yes. Go ahead.

The Witness: After this incident, I didn't recall exactly what Corey bought or whatever he had under his arm. But, when I came in the day—the day at a quarter to seven [fol. 314] and I finished the following day at a quarter to eleven and my wife is with me and then the following morning I come into work the same hours and I find four detectives sitting in a seat and my wife is in half tears and she got the griddle and people waiting there and I see the same man serve me with a summons or warrant. You recollect that man. That man stands out in your face and then when he told me the incident and what I am charged with, you could remember that 20 years ago, I think. So, it was quite outstanding.

Q. But, he didn't tell you where he was seated, did he?

A. I knew where he was seated. That man's face will remain in my sleep for a long time.

Q. So, you recall where he was seated?

A. That's correct.

Q. Is not it a fact that you were not served with a warrant until after two days after this occurrence?

A. That's right, sir.

Q. Isn't it a fact that you went to the store the next day after this sale and you conducted business as usual?

A. Yes.

Q. And there were people that came in and sat on the [fol. 315] seat and had coffee; is that right?

A. Yes.

Q. And people came in and bought magazines?

A. Right, sir.

Q. But you recall exactly where he was sitting although you do not recall what day October 26th is, do you?

A. No, I don't.

Mr. Rivers: Your Honor, may I just have a response to my question?

The Court: He says no, he doesn't. Assuming you know what day of the week it was.

Q. You stated that Lance Corey had been in your store four times in total; is that right?

A. Four times.

Q. Totally, four times?

A. No, he came in quite often. Sporadically off and on.

Q. It was not four times?

A. No.

Q. So, you were in error when you said four times?

Mr. Ezra: I object, if the Court please. There is no such testimony that he was there four times. I do not know where Mr. Rivers gets that information from.

[fol. 316] A. I didn't say four times.

The Court: How many times was he there?

The Witness: Off and on. I can't remember offhand, but it was more than four times. It was more than 10 times.

The Court: Over how long a period of time?

The Witness: Since I am in the store, which is two years and four months. I would say on and off. He wasn't a regular customer, like regular people around the neighborhood, they'll drop in two or three times.

The Court: You said he was there more than ten times?

The Witness: Yes. Off and on he would come.

The Court: When he came in how did he address you as, "Mr. Ginsberg" or "Sam" or what?

The Witness: Excuse me, Judge. He never addressed me and I never addressed Mr. Corey and I never addressed him as Lance, sir.

Q. Let me ask you this, Mr. Ginsberg: You are stating for the Court now that he never addressed you?

A. Yes, sir.

Q. Did you not answer to a question asked by Mr. Ezra on direct examination, he said to you, "Sam, I have the magazines here, it's $1.20, Sam?"

[fol. 317] A. He said, "Sam." My name is on the outside of the awning, plus it's on the window sill.

Q. You just told the Court he never addressed you?

A. What? He said, "Sam, $1.20." That was it.

Q. Isn't it a fact, Mr. Ginsberg that you offered Lance Corey a job in your store?

A. I never did.

Q. You wanted him to work for you?

A. Never did. There were lots of boys.

Q. Mr. Ginsberg, I ask you to just answer my question.

A. Excuse me.

Q. There came a time during October, two days before the 18th or so, when Mrs. Corey came into your store; is that not right?

A. Yes, sir.

Q. At that time, she had a conversation with you; is that right?

A. Right, sir.

Q. And the conversation was with regard to these magazines; is that not right?

A. Right, sir.

Q. Were you present in the courtroom when she testified?

[fol. 318] A. Yes, sir.

Q. Had you ever seen Mrs. Corey prior to the date that she came into your store?

A. No, sir.

Q. Had you ever had words prior to the date that she came into your store?

A. With Mrs. Corey?

Q. Prior to that day.

A. No, sir.

Q. Did you hear her testify that she came into the store and told you that you should not sell these type magazines to her son?

Mr. Ezra: Excuse me, sir. Can we have, as long as the question is directed at the witness in that manner, intending to show some other time, I ask that a time be fixed.

The Court: No, we are talking about the time she came in the store.

Mr. Ezra: But he wants to have this witness—

The Court: Now, you are reading his mind, Mr. Ezra.

Mr. Ezra: No, I am not. I believe if there is a sequence of questions—

The Court: Read the question, Mr. Reporter.

[fol. 319] The Court: Nothing objectionable about that. Objection overruled. Answer the question. Did you hear her testify?

The Witness: Yes.

Q. Was she correct in that testimony? Did she say that to you?

A. She said that to me, yes.

Q. Did you hear her testify that you said that you would sell them to anyone?

A. I never did.

Mr. Ezra: Your Honor, I object to this. If I remember what Mrs. Corey said, she said that Mrs. Ginsberg said that, not that Mr. Ginsberg said it.

Mr. Rivers: No, that was not the testimony.

The Court: Mr. Reporter, go back and find Mrs. Corey's testimony. We can save some time. The Court's notes show that Mrs. Corey testified she came in the store with her six year old son, looked at the magazine rack, saw Mr. Annual, Sir and Escapade and said to Mr. Ginsberg, "I'm

Lance Corey's mother," and she told Mr. Ginsberg that Lance was 16 when he bought the magazines and Mr. Ginsberg replied, "It's no concern of mine how old anyone is. [fol. 320] If he wants to buy it, I'll sell it to him."

By Mr. Rivers (continuing):

Q. Do you recall that testimony?

A. I recall the testimony.

Q. Was Mrs. Corey mistaken as to that testimony on your part?

A. I never made that statement.

Q. Do you recall whether or not Mrs. Corey was alone when she came into the store?

A. I just saw Mrs. Corey leaning over the counter when she spoke to me.

Q. Do you recall what your wife said, if anything, at the time Mrs. Corey came into the store?

A. After she finished speaking to me, I was quite busy.

Q. I am asking you, if you recall, yes or no, what your wife said?

A. No.

Q. Did you hear Mrs. Corey testify that your wife said, "You should take care of your own son. Bring him up correctly and he wouldn't buy such magazines?"

A. No, I don't.

Q. You did not hear your wife say that?

A. No. I was busy in the back. I didn't hear anything.

[fol. 321] Q. You cannot say whether or not she did say, can you?

A. No.

Q. Do you recall Lance Corey being in the store at sometime prior to the 18th day of October, 1965?

A. No, I don't.

Q. He was not in the store at any time prior to that date?

A. Might have been, but I don't remember, sir.

The Court: Didn't you tell me before that he was over a period of—

The Witness: (Interposing) He came in occasionally.
The Court: More than ten times?
The Witness: Yes. He would come in occasionally.
The Court: This was before October 18th, was it not?
The Witness: Yes. I'm sorry.

Q. Do you recall Lance Corey coming into the store before October 18th, with his girl friend?
A. Yes.
Q. Do you know his girl friend?
A. No. I don't know his girl friend, but she would come in. I don't know if it's girl friend, but they would sit to-
[fol. 322] gether.
Q. But, you remember him coming in and sitting down at the counter with the girl?
A. Yes.
Q. Do you recall Lance Corey having a conversation with you wherein he advised you that he was 16 years old and you should remove the books from the counter and not sell them to 16 year olds?
A. That boy never made a statement to me over that counter, sir.
Q. Answer this, Mr. Ginsberg. What do you know about Adam and Eve?
A. I never spoke to him about Adam and Eve, sir.
Q. You heard the testimony that he gave with regard to that; is that correct?
A. I don't know if I should say it, but this is an untruth. I don't know if it's the right word to use, Judge, can I say this word?

The Court: Say what transpired. You cannot shock my sensibility.
The Witness: It's a lie.

Q. Let me ask you this. Have you ever had an argument with Mr. Lance Corey whereby you put him out of the store and had harsh words?
A. Never did.
[fol. 323] Q. Was he a mannerly kid that conducted himself well in the store?

A. Well, he would sit at the counter a long time and just sit with the sodas and I would have to take it away and he would leave at his own, wouldn't have to say anything. But, after you take away the soda or whatever it is, it's more or less a sign that's it.

Q. You had disputes, is that it?

A. No,

Q. You did not have disputes?

A. No. I never spoke to the boy.

Q. Is he the kind of kid that went in there and caused a lot of disturbance in there?

A. No.

Q. You never had any argument, you and he?

A. No.

Q. He called you Sam. That's your first name?

A. Right.

Q. You were on friendly terms?

A. Right.

Q. Would you tell the Court why he could come in here and prefabricate a story?

Mr. Ezra: I object to that.

The Court: Objection sustained. It calls for the opera-
[fol. 324] tion of the witness' mind.

Q. Now, it is your testimony then, on the 26th day of October, there was a Detective Sergeant Groh sitting at the counter near the cash register having coffee?

A. Right.

Q. Lance came in and purchased two magazines?

A. It could have been more. He purchased magazines for $1.20.

Q. Which he rolled up under his arm and said "Here, Sam, $1.—"

The Court: (Interposing) Wait a minute. You are misquoting testimony. It was not rolled up.

Q. He said, "Here, Sam, is $1.20," and immediately left the store?

A. Right.

Q. There was nobody in the store but yourself, Detective Groh and Lance Corey; is that right?

A. Right.

Q. Nobody else came in during that period that he was there, right?

A. Right.

Q. At what time was that, in the evening?

A. In the evening. I don't remember exactly when. Be-
[fol. 325] tween 5 and 5:30.

Q. At the time he paid for the magazine, he gave you the perfect amount of money, $1.20; is that correct?

A. That's right, sir.

Q. Let me ask you this. From time to time, during this two years and four months that you owned this candy store, it has been frequented by teenagers; is that not right?

A. Youngsters. Very fine youngsters.

Q. How many youngsters wold you say come in?

A. Quite a few.

Q. You had occasion to observe these quite a few youngsters; is that right?

A. Yes.

Q. You had occasion to form opinions as to their age and age group; is that not right?

A. Yes.

Q. Let me ask you this. What age group does Lance Corey fall into?

A. It's all ages.

Q. Based upon your observation of him?

A. The way he is dressed at times, he could be 17 or 18 or he could be 15.

Q. Did you ever form an opinion as to his age?

[fol. 326] Mr. Ezra: I object. It calls for an operation of the mind, your Honor. He is not an expert.

The Court: No. I think that under the circumstances we will take this.

Mr. Ezra: Respectfully except.

The Court: He said that he could be 17 or 18 or 15, according to the way that he was dressed at the time.

Q. Is that not right?
A. Right.
Q. But you never asked him what his age was, have you?
A. No, I didn't.

Mr. Rivers: I have nothing further, Mr. Ginsberg.
The Court: Anything else, Mr. Ezra?
Mr. Ezra: Yes, your Honor.
The Court: Now please confine yourself to redirect on the cross-examination, unless there is some unusual circumstances. I do not want to go into a new direct again.

Redirect examination.

By Mr. Ezra:

Q. Mr. Ginsberg, you were asked about the size of the [fol. 327] magazines that are involved in this prosecution. I show you these magazines and ask you whether the magazines are all about the same size in that bundle?
A. Quite the same size.

Mr. Ezra: I ask the Court to take notice of the fact—
The Court: Let's save some time. Give me that bunch of magazines. (Handed.) Let the record show Escapade, Man to Man, Mr. Annual, Sir, Photography, World Camera Annual, are all approximately the same size, within a few millimeters of each other. We can dispose of that question very quickly.

Q. You were asked about the ages of children, Mr. Ginsberg. Did you ever sell Escapade, Man to Man, Mr. Annual, Sir or other girly magazines to children whom you knew to be under the age of 17?

Mr. Rivers: Objection.
The Court: Sustained.
Mr. Ezra: Respectfully except.

Q. Have you read all of these magazines that are known as Escapade, Man to Man, Mr. Annual and Sir?

Mr. Rivers: Objection.

Mr. Ezra: The whole cross-examination hinged on what [fol. 328] he knows about these magazines.

The Court: The cross-examination dealt with his awareness of the content.

Mr. Ezra: Yes.

The Court: You are asking him if he read them, each issue?

Mr. Ezra: Each issue of the ones that are here of which he is charged of selling.

Mr. Rivers: I object, that he is leading and I object that is not correct.

Mr. Ezra: How can I ask the question?

The Court: I will allow the question.

Q. Have you read these magazines, Sir, Escapade, Man to Man, Mr. Annual and Sir?

A. At a glance you read them. We don't—

The Court: (Interposing) Read the answer to that question.

(Answer read back.)

The Court: Now Mr. Ginsberg, I am going to show you something. I show you People's Exhibit number 1 in evidence, which is a picture of the book rack in your store. Now, I particularly call your attention to the third column of magazines from the right of the picture. Do you see the column?

[fol. 329] The Witness: Yes.

The Court: What is the top magazine on that rack?

The Witness: Escapade.

The Court: Now, I think that you told Mr. Rivers on cross-examination that Escapade was a girly magazine?

The Witness: Yes.

The Court: You told him as a girly magazine it contained pictures that you were aware of with bare breasts and bare buttocks?

The Witness: Yes.

The Court: I want you to look down that column and tell me if you see any other magazines down there that conform to the type of magazines known as girly magazines?

The Witness: They all do.

The Court: Every one in that column?

The Witness: Except this one here.

The Court: Which one? What is the name of it?

The Witness: "Mad."

The Court: That is not a girly magazine?

The Witness: No.

The Court: Tell me the names of the ones that are girly magazines?

[fol. 330] The Witness: Millionaire, Man to Man, Topper, Gem, Men's Digest, Jaguar, Gent.

The Court: Now, you say they are girly magazines. You put these magazines in the rack, did you not?

The Witness: Yes.

The Court: Now, either in the process of putting them in the rack or taking them out of the rack, did you become aware of the content of these magazines so you could designate them as "girly magazines?"

The Witness: Yes.

By Mr. Ezra (continuing):

Q. As a matter of fact, they were sold to you as girly magazines, were they not?

A. Yes. They send in that type of magazine.

Q. Now, I show you page 12 of Escapade magazine for December, 1965. I believe that is the same one that is in evidence here and ask you to look at page 12.

A. Yes.

Q. Will you tell us please, what that story is about.

Mr. Rivers: I object, your Honor. There is no foundation laid.

[fol. 331] The Court: First ask him if he read it.

Mr. Ezra: I am asking him to look at it now.

The Court: Do you want him to read the whole story now?

Did you read that story?

The Witness: I didn't read it until now.

The Court: How could he tell you what it is about if he never read it?

Mr. Ezra: He deals with something that the Court knows—

Mr. Rivers: (Interposing) I object to the Counselor testifying.

Mr. Ezra: These things are in evidence?

The Court: Mr. Ezra, please, do you want him to read it now? He said he never read it.

Mr. Ezra: Would you like him to read it now?

The Court: Is there any point in having him read it? It is in evidence. I can read it. You can call my attention to it. It is in evidence.

Mr. Ezra: Can I ask for a concession that it is not a girly story?

The Court: No, you will not get a concession because [fol. 332] I have not read it. But, I will read it, though.

Now, you are asking for concessions. Look at page 17 of the same issue. There is a story there, "Wayfaring Stranger." Is that a girly story, Mr. Ezra?

Mr. Ezra: Of course, that is.

The Court: Look at page 28.

Mr. Ezra: Yes. I cannot answer your Honor's question whether this is a girly story.

The Court: You have not read it?

Mr. Ezra: No, I have not.

The Court: Look at page 25, "The Last Show." What kind of story is that, Mr. Ezra?

Mr. Ezra: This is an actual news story.

The Court: What kind of story it is? What is the subject matter?

Mr. Ezra: I would not know.

The Court: Suppose you go home and read it. I have read it.

Mr. Ezra: It is about a theatrical production.

The Court: It is a story of a show in France. At the last performance of which all the players in the play let themselves go up to cloud nine. It is a story of, shall I [fol. 333] say, freedom.

Mr. Ezra: It is a news story. It is an actual happening.

The Court: Right, Mr. Ezra.

Mr. Ezra: And that certainly is something the press can print.

The Court: Nobody is arguing about that, Mr. Ezra.

Mr. Ezra: So that there are other things in these magazines, other than girly stories.

The Court: No doubt about it.

Mr. Ezra: That is all I wanted to show your Honor.

The Court: No doubt about it. That is a common practice in connection with girly magazines. The publishers will always put certain news stories, certain non sex stories in the magazine in connection with pictures of nude women or shall I say naked women.

By Mr. Ezra (continuing):

Q. Mr. Ginsberg, have you ever been convicted of a crime?

A. No.

Mr. Ezra: That is all, your Honor.

The Court: Any further questions of Mr. Ginsberg?

[fol. 334] Mr. Rivers: No questions.

The Court: It is now twenty after four, Mr. Ezra.

Mr. Ezra: I have one more witness.

The Court: That witness is going to be examined and cross-examined.

Mr. Ezra: Undoubtedly.

The Court: Then we are going to have arguments on the motions that may or may not be made. The Court will adjourn to tomorrow morning at 9:30.

(Witness excused.)

[fol. 335]

IN THE DISTRICT COURT OF THE STATE OF NEW YORK

NASSAU COUNTY

FIRST DISTRICT

[Title omitted]

Before: Hon. Julius Chinman, District Court Judge.

NON-JURY

CRIMINAL PART V
First District Court
West Wing
Old Country Road
Mineola, New York

Transcript of Trial—April 20, 1966

APPEARANCES:

(Same as heretofore mentioned.)

Reported by: Robert J. Hellman, Official Reporter.

[fol. 336] The Court: Are the People ready?
Mr. Rivers: Yes.
The Court: The defendant?
Mr. Ezra: Yes.
The Court: Is the defendant in the courtroom?
Mr. Ezra: Yes.

PAULINE GINSBERG, a witness on behalf of the Defendant, residing at 1697 Hannington Avenue, Wantagh, New York, after first being duly sworn, testified as follows:

Direct examination.

By Mr. Ezra:

Q. Mrs. Ginsberg, are you the wife of the defendant Sam Ginsberg?
A. Yes.

Q. Do you live with your husband?
A. Yes.
Q. Do you have a family?
A. Yes.
Q. How many children do you have?
A. Three.
Q. Are these children born of this marriage with Sam Ginsberg?
A. Yes.
Q. Do these children live at home with you?
[fol. 337] A. Yes.
Q. Do you work in the store at 1507 Bellmore Avenue, Bellmore, New York, with your husband?
A. Yes.
Q. Are you there all day or are you there at various times of the day?
A. Most of the day.
Q. Now, I ask you, Mrs. Ginsberg, if you recollect an instance when a woman came into the store and spoke to your husband in a loud voice?

Mr. Rivers: Your Honor, I object to that.
The Court: Sustained.

Q. Do you recall an instance when a woman came into the store and spoke to your husband about her son and about magazines?
A. Vaguely.
Q. Now, can you tell us about when this conversation was or when that woman came into the store?
A. In the fall.
Q. Do you recollect what this woman said? Do you recollect that incident?
A. Not too clearly because I was behind the counter.
Q. Can you tell us what you do remember of it?
[fol. 338] A. Well, there was some shouting. I was waiting on some customers. Of course, I was directed to where this shouting was coming from.
Q. Incidentally, who did the shouting?

A. The woman.

Q. At whom was she shouting?

A. At my husband.

Q. What, if anything, did you hear this woman say as she shouted?

A. Something about magazines.

Q. Did you hear what your husband said to her?

A. Not too clearly.

Q. Did you hear anything that your husband said to her?

A. Well, I heard him say, "Who is your son and who are you?"

Q. At any time, did you hear your husband say to this woman, "I don't care how old he is. If he wants to buy magazines, he can buy them?"

Mr. Rivers: Objection. It is leading.

The Court: All right. It is leading. I will allow it.

The Witness: Never.

Mr. Rivers: What was the answer?

[fol. 339] The Court: Let me hear the question and answer?

(Question and answer read back.)

Q. What if anything did you see your husband do as this woman was in the store?

A. He walked over to her.

Q. After this woman said what you told us she said, what did your husband do?

A. He tried to calm her. With this, I left my customer and went over to her and asked her to please lower her voice and I said, "Is there anything I can do to help you," and she started to rave on about certain magazines and I said to her, "Which magazines are you referring to? Who is your son?" She says, "Oh, you know what I'm talking about," and she stormed out of the store.

Q. Is that all that happened on that occasion?

A. Yes.

Q. Did you at any time say anything other than what you have told this Court?

A. No.

Q. Did your husband say anything to her other than what you have told this Court you heard?

A. No.

[fol. 340] Q. Did you know this woman before the day that she came in?

A. No.

Q. Had you ever seen her before?

A. No.

Q. Do you know who her son was?

A. No.

Q. Did you ever know the name, the full name of this boy, that she was referring to as her son?

A. No.

Q. Did you ever call this young man Lance?

Mr. Rivers: Your Honor, I object to this. This is leading.

The Court: I will take it. Of course, you must remember, Counsel, the witness said in the very beginning she did not remember anything very clearly and it was all very vague in her mind.

Mr. Ezra: Yes, your Honor.

The Court: Now, you are going ahead and leading her into a lot of questions and answers.

Mr. Ezra: I have no further questions.

Cross examination.

By Mr. Rivers:

[fol. 341] Q. Mrs. Corey—I'm sorry. Mrs. Ginsberg, can you, to the best of your recollection tell us what day this occurred, the things that you testified to?

A. I would say in the fall.

Q. This is the closest you can come to the date?

A. Yes.

Q. Now, can you tell me whether or not, if you recall, whether or not this is in the month of September?

A. Perhaps.

Q. Perhaps the month of September. Could it have been the month of December?

A. No.

Q. How about the month of November?

A. No.

Q. The month of October, how about that?

A. Could be.

Q. It could have been the month of October. Now you say that it could have been the month of September. Will you tell us to the best of your recollection, whether, this could have been the early part of September or the latter part of September?

A. The latter.

Q. When you say it could have been the month of October, could you tell us whether or not it could have been [fol. 342] the early part of October or the latter part of October?

A. It could have been either one.

Q. Either one, although it might have been the latter part of September?

A. That's right. It could have been.

Q. Do you recall about what time it was when this occurred?

A. In the afternoon.

Q. When you say in the afternoon, would this have been before 3:00 or after 3:00?

A. I would say after.

Q. After three. Now, on this date, when this lady came into the store, was she in the company of anyone else at that time?

A. Not that I remember.

Q. Although it is possible that she could have been with somebody, you do not remember at this time?

A. I don't remember.

Q. Now, do you recall whether or not there were other persons in the store at this time?

A. Yes.

Q. Would you say that it was crowded in the store; that is, that you were doing a good brisk business at the [fol. 343] time?

A. Yes.

Q. And at the time you were waiting on customers; is that correct?

A. Yes.

Q. Do you recall what activity, if any, your husband was engaged in at the time?

A. Waiting on customers.

Q. He was also waiting on customers. Now, there came a time—withdrawn. Where were you waiting on customers with respect to the layout of your store?

A. Near the bay area.

Q. Near the bay area. That is a separation between—

A. No.

Q. Where is that?

A. The farthest end of the counter.

Q. The lunch counter?

A. Right.

Q. This is toward the rear of the store?

A. Right.

Q. Can you recall where your husband was waiting on customers at the time?

A. Perhaps in the center of the counter.

[fol. 345] Q. Now, do you recall where this lady took a position in the store when she came in?

A. In back of the counter.

Q. The lady went behind the counter?

A. No. When I say in back of the counter, meaning I was in back. She was in front of the counter.

Q. Now, did you observe this lady when she first entered the store? Did you observe her as a result of something you heard?

A. Her shouting.

Q. You heard her voice?

A. Right.

Q. From that, you made an observation. You did not see her when she came into the store?

A. No.

Q. Can you tell me how long the shouting took place before you approached the lady?

A. Perhaps a minute or less.

Q. During the course of this shouting, as you say, where was this lady standing with relation to your husband?

A. Front of the counter.

Q. Right in front of your husband?

A. No. About three feet away. Two or three feet [fol. 346] away.

Q. Would she have been closer to your husband or to you?

A. To my husband.

Q. Now, what would you say would be the distance between where you were standing and where your husband was standing?

A. Several feet.

Q. Now, during the course of the shouting, were you engaged and waiting on a customer, actually taking money or giving merchandise?

A. Giving merchandise. Waiting.

Q. You did not at any time—withdrawn. As I recall from your testimony on direct examination to the question asked by Mr. Ezra, you stated that you vaguely recall the woman in the store; is that right?

A. Vaguely, yes.

Q. You heard some shouting, but you could not hear what your husband said to her; is that correct?

A. He was trying to calm her down.

Q. No, no. Mrs. Ginsberg, did you not tell Mr. Ezra in response to one of his questions, that you heard some shouting but you could not hear what your husband said [fol. 347] to her?

A. Repeat that, please?

Q. I stated that in response to one of Mr. Ezra's questions, did you not tell him that you heard some shouting,

but you could not hear what your husband said to this lady?

A. I said he was trying to calm her.

Q. Mrs. Ginsberg, actually, there came a time subsequent to your completing the waiting on this lady, that you approached where Mrs. Corey was standing; is that not right?

A. Yes.

Q. Prior to that time, as I recall in your testimony on direct examination you stated that you heard some shouting from this lady, but you could not hear what your husband said to her, do you recall stating that?

Mr. Ezra: Your Honor, respectfully submit that that question has been asked and answered twice.

The Court: It was not answered yet. It had been asked, but was not answered.

Mr. Ezra: To the best of her ability.

The Court: No, no, Counsel. Please do not testify. The [fol. 348] question has been asked several times and has not been answered.

Please answer the question, Mrs. Ginsberg.

The Witness: I said I heard the conversation vaguely. She was shouting about some magazine.

Q. Mrs. Ginsberg, are you saying that you did not say that in response—you did not say that in response to Mr. Ezra's question, "That I could not hear what my husband said to her?" Do you recall stating that?

A. I recall saying that I heard the conversation vaguely.

Mr. Rivers: May I have the record read back?

The Court: Yes. Mr. Reporter, will you go back to the direct examination of this witness and read the record.

(Record read back.)

The Court: Does that answer your question, Mr. Rivers?

Mr. Rivers: Yes.

Q. Let me direct my question again, Mrs. Ginsberg. You [fol. 349] stated to a question asked by Mr. Ezra, that you heard read back now, that you could not hear too clearly what your husband said to this lady; is that a fact?

A. It's a fact.

Q. Now, so that as a matter of fact, you could not say whether or not he used the words, "I don't care how old your son is. If he wants to buy magazines, he can buy them?"

A. Excuse me?

Q. I say, Mrs. Ginsberg, you cannot say then whether or not your husband said to this lady, "I don't care how old your son is. If he wants to buy magazines, he can buy them."

A. Well, I would hear that.

Q. You would have heard that?

A. Yes.

Q. Although you could not have heard too clearly what he actually said?

A. I would have heard that.

Q. But, it is a fact that you could not hear too clearly what he actually said; is that correct?

A. Would that be directed in a—

Q. (Interposing) Mrs. Ginsberg, can you answer that [fol. 350] yes or no?

A. I would have heard that. He did not say that. He cannot say that.

Q. Let me ask you this, Mrs. Ginsberg. Does anyone work in the store besides yourself and your husband?

A. Yes.

Q. Yes?

A. Yes.

Q. Who works in the store besides yourself and your husband?

A. We have a woman and we have a boy who comes in in the evening.

Q. A woman and a boy?

A. The woman comes in mid-morning. 11:30.

Q. The woman comes in mid-morning?

A. Right.

Q. What is the woman's name?

A. Mrs. Regina.

Q. The boy, what is the boy's name?

A. Raymond Sebowl.

Q. Mrs. Ginsberg, when I asked your husband the same question, he responded that a young boy came in on weekends. He did not mention Mrs. Regina.

[fol. 351] Mr. Ezra: If the Court please, that is not my recollection of the evidence. He said he had a boy coming in evenings to clean up with him, 7 to 9:00.

Mr. Rivers: Now, we are getting testimony from counsel for the benefit of the witness.

The Court: All right. Do you want the record read again?

Mr. Ezra: I do not want it read.

The Court: Do you want me to look at my notes?

Mr. Ezra: If you do not mind.

The Court: Without trying to limit your cross-examination, is it very pertinent whether Sebowl works there or some woman works there?

Mr. Rivers: I just would like to ask one further question about that. I will let that go.

The Court: Withdraw it?

Mr. Rivers: Yes.

Q. Let me ask you this, Mrs. Ginsberg. When did Raymond Sebowl begin to work there?

A. I would say going on two years.

Q. Two years?

A. Not quite. I would say going on. I mean perhaps [fol. 352] 18, 19, 20 months. I don't know exactly. But, I would say going on the second year mark.

Q. Mrs. Ginsberg, do you have regular customers in that store, people that come in repeatedly?

A. Yes.

Q. Do you have persons that are not regular customers, persons that come in occasionally?

A. Yes.

Q. And the persons who are not regular customers, do they call you by name?

A. Yes.

Q. What name do they call you?

A. Pauline.

Q. These are the persons that are not regular customers; is that right?

A. Some do and some don't.

Q. The persons that are not regular customers, do they call Mr. Ginsberg by name?

A. Occasionally.

Q. What do they call him?

A. Sam.

Q. Is it a fact that everyone comes in the store calls Mr. Ginsberg, Sam?

A. Who comes in, yes.

[fol. 353] Q. Everyone who comes in?

A. Most everyone.

Q. Does Mr. Ginsberg call them by name?

A. Regular customers, yes.

Q. He always calls them by name?

A. Yes.

Q. The regular customers?

A. Yes.

Q. Mrs. Ginsberg, are you aware of the content of the magazines Escapade, Sir, Mr. Annual. Man to Man?

A. Not too much.

Q. When you say, "Not too much," what do you mean?

A. Well, I never handle magazines.

Q. When you say you never handle—

The Court: (Interposing) Just a minute, Mr. Rivers. Find out who these people are and what they are doing here.

(Off the record.)

Q. When you say you never handle magazines, Mrs. Ginsberg, does that mean you do not actually engage in the sale of these magazines?

A. Very, very rarely.

[fol. 354] Q. Very rarely. Do you know anything about the stocking of these magazines? That is, how many varieties of magazines are actually within your shop?

A. Well, only from what I can observe across the counter.

Q. You could not tell us as you sit now, how many different type magazines you have in the store?

A. I would say in the hundreds.

Q. But you do not actually sell magazines? It is very rarely that you sell magazines?

A. If a woman comes up with a magazine, I sell it.

Q. But, it is very rarely that you sell magazines; is that not your answer?

A. You asked me if I handle magazines. I said I do not handle them to put them away or check the stock.

Q. But you do sell them?

A. I sell them, yes.

Q. So when you say, "very rarely," you mean you handle them rarely, but you sell them?

A. I sell them, yes.

Q. Have you had occasion to sell the magazines Escapade, Man to Man, Mr. Annual and Sir?

[fol. 355] A. Never.

Q. Never have you sold them, but they are in the store that your husband owns; is that correct?

A. I do not know.

Q. You do not know whether they are there?

A. I don't. I have never observed them.

Q. But, you are vaguely familiar with the contents of these magazines?

A. No.

Q. You are not at all familiar with the contents?

A. Not too clearly.

Q. I call your attention to the date of October 26, 1965 and ask you whether or not you were in the store on that date?

A. I'm sorry, I didn't hear you.

Q. October 26, 1965, were you in the store on that date, in your store?

A. If I can recall, yes. I don't recall taking a day off. I must have been in the store.

Q. Were you there at approximately 5:15 P.M.?

A. I can't remember because I generally leave around four.

Q. You generally leave at four?

[fol. 356] A. Around four, yes.

Q. I call your attention to the date of October 18, 1965 and ask you were you in the store on that day?

A. October 18th?

Q. Yes.

A. I can't remember because very often I will get tied up and I might remain a little later. Most of the time I would leave because my children come home.

Q. You were present in the court during the last few days of trial, were you not?

A. Yesterday and today.

Q. On the first day of trial were you present here?

A. No.

Q. You were not present?

A. No, sir.

Q. Did you see Lance Corey?

A. I don't know who he is.

Q. You never saw him? How about Mrs. Corey, did you see her?

A. When?

[fol. 357] Mr. Ezra: Mr. Rivers, are you referring to yesterday in court?

Mr. Rivers: Any one of these days.

A. Excuse me?

Q. Did you see Mary Corey?

A. When?

Q. Any one of the two days that you were here.

A. No. I don't know who she is.

Q. You do not know who she is?

A. No.

Mr. Ezra: If the Court please, I believe the witness—

Mr. Rivers: I object to the testimony of Counsel. This is the second or third time he is trying to reconstruct the witness.

The Court: Mr. Ezra, if you have anything to say with respect to the witness' testimony, but I will not listen to a statement at this time unless you have an objection to a question.

Mr. Ezra: Your Honor, then, maybe we ought to excuse the witness so that I can make my objection or have the record show something.

The Court: Mr. Attendant—will the witness leave the stand and go with the attendant. Go to one of the jury [fol. 358] rooms until she is recalled.

(Witness leaves courtroom.)

The Court: What is it, Mr. Ezra?

Mr. Ezra: If your Honor please, I was in court yesterday and today as well. Not once did I see Mrs. Corey or Mr. Corey in the courtroom yesterday or today.

The Court: That is not the issue here.

Mr. Ezra: That is what he is asking her.

The Court: He asked her if she saw her at any time.

Mr. Ezra: But his previous question.

The Court: What is the point. This case started on Monday. Today is Wednesday. Now, Lance Corey testified on Monday and Mrs. Corey testified on Monday. Now the witness says she was not here Monday.

Mr. Ezra: That is right.

The Court: All he asked her was if she saw Mrs. Corey, that is all.

Mr. Ezra: But the continuity of questions referred to yesterday, whether she was in court and today.

The Court: All he asked, if she knew Mrs. Corey and [fol. 359] that she said she did not know about Mrs. Corey.

Mr. Ezra: I understood him to ask about yesterday and today.

The Court: If Mrs. Corey was not here yesterday and today and the witness said she did not see her, there is nothing inconsistent.

Mr. Ezra: Let the record show that Mrs. Corey was not here.

Mr. Rivers: On redirect he will be able to rehabilitate the witness' testimony.

Mr. Ezra: If the Court please, if any associate of mine had spoken up the way Mr. Hartman had spoken up—

The Court: Mr. Hartman, did you say anything?

Mr. Hartman: I said, "Rehabilitate."

The Court: Mr. Hartman, please refrain from any comments. You are here as associate counsel. We will not have any asides or any comments.

Mr. Ezra, your objection to that is well taken.

Mr. Ezra: So that can we have these questions specify, your Honor, as to any time?

The Court: You will permit Mr. Rivers to cross-examine. [fol. 360] You will have a chance to redirect. Your objection is overruled.

Recall the witness. Witness returns to the stand. Mr. Reporter, is there a question unanswered there?

(Question read back.)

By Mr. Rivers (continuing):

Q. Isn't it a fact, Mrs. Ginsberg, that you answered me on cross-examination that you heard or you saw Mrs. Corey in the store and you saw her yelling at your husband?

A. Yes.

Q. And now you are telling us you do not know her?

A. That's right.

Q. Now, isn't it a fact that when Mrs. Corey was in the store, you told her that if she took care of her own son and brought him up correctly, he would not buy such magazines?

A. No. It's not a fact.

Q. You never said that?

A. No, sir.

Q. Isn't it a fact that you and your husband attempted to hire Lance Corey as a worker or employee in your store?

[fol. 361] A. No, sir.

Q. This is not a fact?

A. No, sir.

Mr. Rivers: I have no further questions.

The Court: Mr. Ezra?

Redirect examination.

By Mr. Ezra:

Q. Have you had this boy Raymond Sebowl working steadily for you for at least the 18 or 20 months that you testified to?

A. Yes.

Q. And did you at any time employ anyone else, any other boy besides this Raymond Sebowl?

A. No.

Q. In October of 1965, was this Raymond Sebowl working for you?

A. Yes.

Q. Was this Raymond Sebowl working for you in July of 1965?

A. Yes.

Q. Did he work for you straight through, up to the present time?

A. Yes.

[fol. 362] Q. Is he still employed by you?

A. Yes.

Q. Now, when you say you do not know Mrs. Corey, will you please explain that to the Court?

A. There are hundreds of faces that come into the store. Very often, the same faces can come in day in and day out and I can't identify him with whom he belongs.

Q. Now, other than that one time, when Mrs. Corey came into the store, which you related to us, did she ever come into the store again, to your knowledge?

A. No, sir.
Q. Did you ever see her in the store again?
A. No, sir.
Q. Is she a customer in your store?
A. No.

Mr. Ezra: That is all.
The Court: Anything else, Mr. Rivers?
Mr. Rivers: Nothing.
The Court: Step down.

(Whereupon the witness was excused.)

Mr. Ezra: The defendant rests.
The Court: Any rebuttal, Mr. Rivers?
Mr. Rivers: Yes. The People call Detective Anderson.

[fol. 363] DETECTIVE ALBERT C. ANDERSON, a witness on behalf of the People, Shield 3, Vice Squad, Nassau County Police Department, having first been duly sworn, testified as follows:

Rebuttal examination.

By Mr. Rivers:

Q. Detective Anderson, are you a member of the Nassau County Police Department?
A. I am, sir.
Q. How long have you been so connected?
A. In excess of 13 years, sir.
Q. Were you a member of the Nassau County Police Department on the 26th day of October, 1965?
A. Yes, sir.
Q. Did you have occasion in your capacity as a member of the Vice Squad to visit Sam's Luncheonette at 1507 Bellmore Avenue, in Bellmore, New York?
A. I did, sir.
Q. Can you tell us was anyone with you when you went to the store?

Mr. Ezra: May we have a time set, your Honor?

[fol. 364] The Court: Yes.

Q. Can you tell us at what time you arrived there?

Mr. Ezra: The day. I do not remember a day having been—

The Court: I thought I heard him say the 26th of October.

Mr. Ezra: He did. I am sorry.

A. At approximately ten minutes after five in the afternoon, Detective Sergeant Groh, myself, Mrs. Corey and Richard Corey arrived in the vicinity of that premises there.

Q. What mode of transportation?

A. We had a Nassau County Patrol Car.

Q. Where did you park the car with relation to the store?

A. Approximately 200 feet from the location.

Q. Did there come a time when the occupants of that car entered the store?

A. With the exception of Mrs. Corey, yes, sir.

Q. Can you tell us in what order they entered the store?

A. Detective Sergeant Groh entered the premises at approximately ten minutes after five. Richard Corey en-

[fol. 365] tered the premises at approximately 14 minutes past five. I entered the premises at approximately 15 minutes after.

Q. Now, can you describe the interior portion of the premises?

A. As I recall it, sir, as I entered the premises to my left was a magazine rack, a large display of magazines. To my right were various items offered for sale. I don't recall exactly what they were. Approximately 15 feet inside the door was a soda counter with stools in front of it, sir.

Q. Did you take a position in the store somewhere?

A. I did, sir.

Q. Where was that?

A. I stood directly next to Richard Corey.

Q. Where was Richard Corey standing in the store?

A. At that time, he was standing at the end of the soda fountain or soda fountain near the door speaking with Mr. Ginsberg.

Q. Was anyone else in the store besides yourself, Lance Corey and Mr. Ginsberg?

A. Sergeant Groh.

[fol. 366] Q. Where was he seated?

A. He was seated at the soda fountain, sir.

Q. Where with relation to you—withdrawn. Where with relation to Mr. Corey and Mr. Ginsberg was Sergeant Groh?

A. I would say approximately 10 feet away in direct view of myself.

Q. Now, was there any conversation between Lance Corey and Mr. Ginsberg?

A. There may have been, sir. I don't recall.

Q. Can you tell us what you observed?

A. As I entered the store, Richard Corey was standing at that counter. In his hand, he held a magazine. I could only see one at that particular time. I could see the cover of it. His right hand, he handed currency to Mr. Ginsberg. Mr. Ginsberg turned away from the boy as I stood next to him, went to the cash register, came back to the boy, gave the boy change. The boy left the premises.

Q. Could you discern what kind of currency Lance Corey gave to Mr. Ginsberg?

A. Green paper, resembling currency. I don't know the denominations.

Q. Did you observe what was in Lance Corey's hand at [fol. 367] the time?

A. Yes.

Q. What was there?

A. I saw one magazine with a nude woman on the cover.

Q. Did you see any other magazines?

A. At that time, no, sir.

Q. May I have the exhibits. (Handed.) Do you know the name of the magazine you saw, the one magazine?

A. Yes, sir, I do.

Q. What was the name?

A. Escapade.

Q. I show you People's Exhibit 4 in evidence and ask you whether or not you recognize this?

A. Yes, sir.

Q. What do you recognize it as?

A. That is the magazine that the boy purchased, sir.

Q. What happened with respect to People's Exhibit 4 after the boy left the store, if anything, if you know?

A. I followed the boy from the premises until we arrived at the patrol car. He handed me two magazines. I [fol. 368] placed my initials on those magazines and the date and had him place his initials on that magazine.

Q. What did you ultimately do with the magazines?

A. I turned them over to Sergeant Groh.

Q. He handed you two magazines. Do you know the name of the other magazine that was handed to you?

A. Off hand, no, sir.

Q. You placed your initials on the magazines?

A. I did, sir.

Q. I show you this magazine and ask you if you recognize it?

A. This is the second magazine, sir.

Q. And these magazines were given to Sergeant Groh?

A. That is correct, sir.

Q. And ultimately, did there come a time—withdrawn. What did you do further with respect to these magazines?

A. I merely turned them over to Sergeant Groh. I had no further dealings with these specific magazines, sir.

[fol. 369] Q. Did you appear in the District Court sometime after?

A. I did, sir.

Q. Was Sergeant Groh with you at the time?

A. I don't believe he was, sir.

Q. Did there come a time when you returned to that store?

A. I never returned to the store, sir.

Q. You never returned to the store?

A. No, sir.

Q. With regard to the conversation or observations made in the store, you have given us your entire testimony?

A. Yes, sir.

Mr. Rivers: I have nothing further.

Rebuttal examination.

By Mr. Ezra:

Q. At the time that you drove to this store with Detective Sergeant Groh, Mrs. Corey and the young man Richard Lance Corey, you said that you parked the car approximately 200 feet away from the store; is that correct; sir?

A. Yes, sir.

Q. Can you tell us, more or less, where this car was [fol. 370] parked?

A. I am not that familiar with the names of the streets in the area, sir. There is a call box at that location where the vehicle was parked.

Q. Now, was this car parked on the same side of the street as the store or was it parked across the street?

A. Across the street, sir.

Q. Was it parked at an angle to the right or to the left of the store as you faced the store?

A. Facing the store, the vehicle would have been parked to its right, sir.

Q. From the position where the vehicle is parked, was it possible to look into the store?

Mr. Rivers: Objection. I object to the form, "Was it possible," or could you or did you.

The Court: Let him answer it.

The Witness: No, sir.

Q. Was 5:14 P.M. October 26, 1965 the first time that you had entered this store?

A. No, sir.

Q. When before that had you been in the store?

A. On prior occasions unrelated to this incident, sir.

[fol. 371] Q. As a customer, do you mean, sir?

A. Not necessarily, sir.

Q. October 26, 1965 was that the first time, that is 5:14 P.M., the first time that you entered the store on that day?

A. Yes, sir.

Q. And at what time did you leave the store, sir?

A. I left at approximately 5:15, 5:17.

Q. Now, would you tell us, please, the order in which you, Mr. Corey and Detective Groh left the store that day?

A. Richard Corey left first. I left secondly, Sergeant Groh left last.

Q. Did you at all that day speak to Mr. Ginsberg, the defendant?

A. To make a purchase, yes, sir.

Q. What did you buy, sir?

A. A package of cigarettes, sir.

Q. Do you know where the cigarettes are kept in that store?

A. No, sir. I don't recall.

Q. Did you take the cigarettes off the stand and pay for them, sir or how did you or how was that accomplished?

[fol. 372] A. They were handed to me, sir.

Q. Where was Mr. Ginsberg during this time that you were in the store?

A. Standing at the end of the luncheonette counter.

Q. During all of this time where was Detective Sergeant Groh?

A. Seated at the lunch counter, sir.

Q. Was he seated facing the counter?

A. I don't recall, sir.

Q. When you say that you saw Mr. Ginsberg take the money from Richard Lance Corey, you saw him go to the cash register; is that correct, sir?

A. Yes, sir.

Q. Now, did he leave the counter that he was working at, that is the lunch counter, in order to go to the cash register?

A. He turned his back to the counter. He would necessarily have to leave it, sir.

Q. Where was the cash register, if you recollect?

A. To the best of my recollection, approximately six feet from where Mr. Ginsberg originally stood.

Q. Was it anywhere else but behind the counter there? [fol. 373] A. Not to my recollection, sir.

Q. Was it in line with where Detective Sergeant Groh was sitting, sir?

A. I have no idea, sir.

Q. Now, you told us that you saw the boy holding one magazine; is that correct, sir?

A. I could see but one magazine, sir.

Q. Will you tell us, please, demonstrate for us, if you will, how that magazine was held with this magazine. Please demonstrate to us how that magazine was held as the boy was at the counter?

The Court: Stand up, Mr. Detective.

A. If this portion of the jury box were the counter, the boy stood as such. The money was handed thusly.

The Court: Let the record show that the detective is standing at the end of the counter with the magazine held in his left hand, with his hand lower and with his right hand handing the money to the defendant.

Mr. Ezra: May we also show for the record, your Honor, that the magazine is facing the inside of his body?

The Court: No, it is not. It is facing at an oblique angle [fol. 374] from his body. The front of the magazine is visible to anybody standing in front of the detective.

Go ahead, Mr. Ezra.

Mr. Ezra: I did not hear the last part.

The Court: The front of the magazine is visible to anybody standing in front of the person.

Now, if you want a demonstration, Mr. Ezra, come in front of Detective Anderson and take a look and then you tell me if you can see the front of the magazine or not. Now, come look, Mr. Ezra. Stand right there.

Mr. Ezra: I am standing—

The Court: No, in front of him. In front of the counter on a straight line with him. Come through the doorway. Stand right there. Can you see the front of the magazine?

That is all. Resume your seat.

Mr. Ezra: May he stand here a moment, please?

The Court: Yes, if you have something relevant.

Mr. Ezra: Yes.

Q. Now, please, during the time that you saw him, from the moment that you came into the store, to the moment [fol. 375] that Lance Corey paid for the magazines, is that the position in which he held the magazines?

A. Yes, sir. I could see the magazine from the time I entered the premises.

Q. You entered the premises from Richard Corey's right as he was standing facing the east wall of the store; is that correct?

A. I entered from his right, yes, sir.

Q. And was the face of that magazine, the cover of that magazine, the front cover, facing the front of the store when you came in?

A. The magazine itself was visible. How much of the cover was visible to me as I entered, I couldn't say, sir.

Q. But, in any event, you looked at this magazine in Richard Corey's hand when it was in the same position that you are now holding the magazine; is that correct, sir?

A. Yes, sir.

Q. And you had to look down in order to see that part of the cover or the entire cover; is that correct, sir?

A. No, sir. I believe my field of vision caught it without specifically looking at the article.

[fol. 376] Q. I ask you now, is that magazine at your eye level at this moment that you are holding it, in the manner that Richard Lance Corey was holding it at the time?

A. Is it at my level at the present time?

Q. Yes. Is it at your eye level?

A. Not at this moment, no, sir.

Q. Assuming that you were at that door, which would be the entrance door to the store, would the magazine be at your eye level in the manner in which it is being held now?

Mr. Rivers: I do know what it is you mean by "eye level."

The Court: Let the record show that the magazine is held at waist level and a person standing a few feet away could see it. That it necessarily is a matter of if I say it is not at the eye level of the person observing, unless he is a midget and Detective Anderson is not a midget.

Mr. Ezra: May the record be corrected. It is not at waist level. It is at thigh level.

The Court: All right. At thigh level. The point is, it is not at eye level.

[fol. 377] Q. Are you taller or shorter or of the same height as Richard Lance Corey?

A. Approximately the same height, sir.

Mr. Ezra: You may resume your seat. Thank you.

(Witness returns to witness stand.)

Q. While Richard Lance Corey was standing in the position that you saw him, with the magazine in his hand, as you demonstrated, was he standing in front of any counter?

A. Besides the lunch counter. I would not say in front of it, sir.

Q. He was beside the lunch counter, you say; is that correct, sir?

A. Yes, sir.

Q. All right. Would that be in the space between the lunch counter and a candy counter which is to the right of it, as you are facing the back bar?

A. I don't recall exactly, sir.

Q. On this counter, the luncheonette counter, at approximately the point where you saw this boy standing as he was holding that magazine, was there anything on top of the counter?

A. I can't say, sir.

[fol. 378] Q. Did you hear anything said by Richard Corey to Mr. Ginsberg?

Mr. Rivers: Objection. The question is did he hear anything said at all.

The Court: I will let him answer it. Overruled.

A. I don't recall.

Q. Did Detective Sergeant Groh say anything either to you or to Mr. Ginsberg or to Richard Corey at the time that you were there?

A. During the period of time I was in the store, I don't recall Sergeant Groh saying anything.

Q. Did you say anything to Mr. Ginsberg that day?

A. I asked for a package of cigarettes.

Q. Other than that, did you have any conversation with him?

A. I had no further conversation with him.

Q. Did you give him the exact change for the cigarettes or did you have to get change, sir?

A. I believe I had to get change.

Q. And as he made the change for you, did he turn around in that counter that he was at?

A. He did, yes, sir.

[fol. 379] Q. He did not have to leave the counter at all in order to make change for you, did he?

A. As I say, to leave the counter to go to the cash register, how far a distance, I estimate approximately six feet. It might be more. It might be less.

Q. What I am trying to get at is—maybe I have not asked the question properly. If you recall, exactly where was that cash register?

A. Approximately six feet from the spot where Mr. Ginsberg and myself stood.

Q. Yes. But where—Was it where the candy counter was? Was it behind the lunch counter? Was it where the magazines are? Where exactly was it, sir?

A. Behind the lunch counter.

Mr. Ezra: Thank you very kindly. I have no further questions.

The Court: Do you have any questions?

Mr. Rivers: Nothing.

The Court: The Court has a question. Now, Detective Anderson, you stated to me that you came in the store. You stood near Richard Corey; is that correct?

A. Yes, your Honor.

[fol. 380] The Court: How far away?

The Witness: A foot away, sir.

The Court: Now, at any time while you were there, did you see Richard Corey place a magazine or magazines, folded under his right arm?

The Witness: No, sir, I didn't.

The Court: I ask you to look at People's Exhibit 4 and 5 in evidence. Those are the magazines which you initialed and which Richard Corey took with him that day from the store; is that correct?

The Witness: That's correct, sir.

The Court: I want you to examine those magazines very very carefully, Detective, each one of them and let me know if there is any objective evidence or signs of folds or creases in those magazines that might indicate that had been folded at any time.

Mr. Ezra: If the Court please, I respectfully object to that question on the grounds that this person is not an expert.

The Court: He does not have to be an expert to see whether or not there are any creases or folds in a magazine.

[fol. 381] Mr. Ezra: If they are evident, I object to the question, that they are evident.

The Court: I want the record to show what he finds and sees.

Mr. Ezra: I respectfully object and except to your Honor's rulings.

The Court: You have your exception.

The Witness: I see no crease marks, your Honor.

Mr. Ezra: There was no evidence whatever, your Honor, that they were ever creased at any time.

The Court: Mr. Ezra, there is no jury here. I am the trier of the fact and law. The evidence in this case has been very clearly that Mr. Ginsberg had the magazines—that Corey had the magazines folded tightly under his right arm. That is what he testified to yesterday. Those are the magazines. I am asking the witness if he can see any crease marks or any evidence of those magazines ever having been folded. Can you, sir?

The Witness: No, sir. I cannot.

The Court: All right. Bring them back. (Handed.)

[fol. 382] Mr. Rivers: The testimony was by the other police officer, was the same testimony given by this police officer.

Mr. Ezra: Excuse me a moment, please.

The Court: Forget about Detective Groh.

Mr. Ezra: Can I, your Honor?

The Court: Can you what?

Mr. Ezra: I would like to ask some questions. I did not know whether Mr. Rivers was through.

The Court: You were conducting your cross-examination.

Mr. Ezra: Then, your Honor—.

The Court: Then both you said you are finished and I asked a question. Now you want the privilege of recross on the questions I asked.

Mr. Ezra: I would like the privilege of asking some additional questions.

The Court: Go ahead.

Examination by Mr. Ezra:

Q. At the time you went back to Mr. Ginsberg's store on the 28th day of October, did anybody accompany you there?

Mr. Rivers: I object. The 26th day of October.

[fol. 383] The Court: He is talking about the day of arrest.

Mr. Rivers: He never went back is what he said.

The Court: Did you ever go back after the 26th?

The Witness: No, your Honor.

The Court: All right. That is that.

Q. Do you know who did go there when the arrest was made?

Mr. Rivers: Your Honor, I am going to object. It could only be hearsay.

The Court: I will sustain the objection.

Mr. Ezra: All right. I have no other questions.

Mr. Rivers: I have no questions.

The Court: Step down.

Mr. Rivers: May I have a couple of minutes?

The Court: Yes. There will be a recess for two minutes.

(Whereupon there was a short recess.)

The Court: Mr. Rivers?

[fol. 384] Mr. Rivers: The People Rest.

The Court: Mr. Ezra?

Mr. Ezra: The defendant rests.

The Court: Mr. Ezra?

MOTIONS AND COLLOQUY THEREON

Mr. Ezra: Yes, your Honor. Your Honor, without going at length into the constitutional questions involved here, as occurred at the end of the People's case, I respectfully ask that those motions become part of the motions to dismiss at the end of the entire case without—as they appear on the record and without having to repeat them.

I further respectfully move for a dismissal at the end of the entire case on the ground that the People have failed to prove the defendant guilty beyond a reasonable doubt.

Now, on that question, if your Honor will permit some comments, I would like to make them.

The Court: Go ahead.

Mr. Ezra: I believe that my recollection of the testimony is that one police officer testified that the cash register was behind the candy counter. The other one testified that it was where it is shown on the picture. The defendant him- [fol. 385] self testified that never since he purchased that store was that cash register moved from anywhere.

I ask your Honor to take into consideration the conflicting testimony of the police officers and even of Richard Corey, Lance himself, because in his testimony he said that he held the titles just a little apart from one another so that the prices of the magazines may show as he was paying Mr. Ginsberg. The Sergeant or Detective Sergeant Groh testified that he held one in each hand. Detective Anderson's testimony entirely conflicts with both of them and he says that he thought it was one magazine and that that magazine was held at arm's length and down into the mid thigh and that he saw part of one title or part of the cover.

Now, your Honor, I do not mean to imply here that there is any skullduggery of any kind. I am sure that all of the witnesses who testified are honest and sincere people, but so is the defendant. Now, I believe that your Honor should take into consideration the fact that this [fol. 386] man is a man who works many hours behind his counter. He was alone in the store at the time. Somebody did give him money for magazines. He did not see these magazines. The element of knowingly selling these magazines to this minor is certainly missing from this case.

I urge your Honor that that is less than the reasonable doubt that is required in a case of this kind. I would not have been as strenuous as I was. I apologize to the Court for any indiscretions on my part in having said things that I did or perhaps acted the way I did, but it was in the zeal of protecting whom I consider to be a fine, upright, upstanding man, family man, without any previous record of any kind. I believe that he deserves the consideration of reasonable doubt in this case.

Of course, and I further go on to say, your Honor, that the other elements of the case set forth in the statute have not been met.

I urge your Honor's consideration.

The Court: For instance what, sir?

Mr. Ezra: Well, with respect to the prurient interest. [fol. 387] It was not shown that this boy was in any way morally harmed from these magazines. Even his own testimony, he was not asked anything about that, what reaction there was to him, but then again, of course, that goes on the constitutional question and on the interpretation of the statute and the proof that has to be offered in the like. But, I stress your Honor, that there is a reasonable doubt in this case and I urge your Honor to consider it carefully in view of the type of defendant that we have here, the type of hard working man that makes a good, solid citizen.

The Court: Mr. Rivers?

Mr. Rivers: Your Honor, without reviewing the law, which is adequate for the Court, based upon the arguments by myself and counsel before the Court at the commencement of this case and after the People had rested and put in the original case, the People vs. the Bookcase case and the Kahan case, the recent decision in the Supreme Court in New York, which I have the Advance Sheet on, which were read to the Court. Without going into the law, [fol. 388] I think that a view should be taken as to what the burden is on the People or what it was on the People in the commencement of this trial pursuant to the statute 484(h). The elements, as I see it, would be to prove that there was knowledge on the part of Sam Ginsberg, the defendant of the type of magazines involved here, the type of material involved here, their content, etc.

Now, this, of course, was admitted to by Mr. Ginsberg during the course of the trial and of course, the testimony of Mary Corey, with regard to the fact that she had a discussion with Mr. Ginsberg and she indicated to Mr. Ginsberg that she objected to the sale of this type of

material to her son. Of course, there was the conversation testified to by Lance Corey, with regard to the fact that he asked Mr. Ginsberg to remove this material from the stands and that this was the type of material that he could get into trouble for selling.

Mr. Ginsberg's own admission that he was aware of the content of the type of magazine. This was a burden upon [fol. 389] the People. The People have met this burden. That there was, in fact, a sale. We have not one sale before the Court that is in this case, but two sales. The sale which was consummated on the 18th day of October and the sale which is consummated on the 26th day of October. We have adequate testimony with regard to the sale. Regardless of what the testimony was on the part of the defendant, taken in its best light, still, there is admission on his part that there was in fact a sale on the 26th day of October to this young fellow of these two magazines that are the subject of the charge under the 26th day of October.

We have also the testimony of the two detectives with regard to the amounts of money which were exchanged for the magazines in their presence. This was eye-witness testimony.

So, as far as that burden is concerned, the People have met the burden of showing that there was a sale. With regard to whether or not this material is harmful to minors and this is taken apart from the fact that whether or not [fol. 390] this was pornographic or not because this was not an express requirement of the statute. It is just the statute entitled "Harmful material." Whether or not this appealed predominantly to the prurient, shameful interest of the minor; whether or not it was patently offensive and whether or not is ultimately without redeeming social importance, we have in addition to the fact that this is an issue of fact before the Court.

We have the testimony of the defendant's own witness, the priest in this case. The priest in this case, Father Stowell, who testified and you recall his testimony, I sup-

pose very vividly with regard to these magazines. "Oh, they're awful." "They could not have any redeeming value. This is, of course, detrimental to minors, etc., etc." His testimony is one of the strongest points on the People's case with regard to this requirement.

Although it is our contention that these are questions of fact to be decided by the Court, we have therefore the [fol. 391] sale of magazines, the magazines being in evidence before the Court indicating nudes. Nudes being defined by the statute as females, the entire breast exposed, the buttocks exposed. We have those before the Court. We have sale, as I have explained to the Court with regard to the testimony that we have had here. We have a knowing aspect on the part of the defendant in that the defendant—in that the testimony has been that the defendant was contacted by the parent here and by the young fellow Richard Corey with regard to these magazines.

As a matter of fact, we have the testimony of Mrs. Ginsberg wherein she states that it was the latter part of September. She could not say in what part of October. That Mr. Ginsberg came into the store and that this conversation ensued. I think that the Court should take cognizance of the fact that there was testimony by Detective Sergeant Groh that when Lance Corey entered the store on the 26th day of October, the conversation went as follows: "Hello, Sam. Hello Lance." So that we have some element there that there was some arrangement or some familiarity [fol. 392] on the part of the defendant with the boy Lance.

Of course, we have his testimony that he was offered a job there and that his mother went there to see the people and see the store before he began to work there. There is, of course, an admission which we should not lose sight of on the part of Mr. Ginsberg, that at times Lance looks like he is 15 and at times he looks like he is 17. I think we have made out every one of the elements beyond a reasonable doubt which are imposed upon the People to prove. The sale, the knowledge, the age and of course, the elements with regard to harmful to minors. These three

elements made out through the defendant's own witnesses. I think the People have proved in every case, beyond a reasonable doubt, all four counts.

The Court: I thought you had finished, Mr. Ezra.

Mr. Ezra: Yes, your Honor, but I had lost track of the fact that these were two separate informations. Therefore, I did not make my motions with regard to each of them.

[fol. 393] The Court: The Court considers your motions as applying to each information and each charge.

Mr. Ezra: Because on the first one, with respect to the one that is alleged to have been made on the 18th, your Honor, there was no corroborating testimony on the part of anybody. It is only the child himself who said that on that day he had gone in there and bought them and that was it. There was no corroboration. There was nothing to show how much was paid for these magazines in the testimony or anything of the sort and the defendants have said that they have absolutely no recollection of that sale. This was the first that they ever heard of it, after the complaint was served on them. I believe that there, the proof is entirely lacking, your Honor and certainly in that instance, he has not been proved guilty beyond a reasonable doubt.

The Court: What do you say about that, Mr. Rivers?

Mr. Rivers: With regard to the sale of the 18th, there was no need for corroboration. There is no need for cor-

[fol. 394] roboration with the statute. There was testimony by Lance Corey that he went into the store, purchases these magazines and that his father was waiting outside and that he turned these magazines over to his father. Subsequently, by the testimony by Mary Corey, his mother, that these magazines were in her presence at that time, after they were turned over to the father.

The Court: I think I have the contentions of both the People and the defense here.

Mr. Ezra: If your Honor is inclined, perhaps your Honor would like to give me an opportunity, before reach-

ing a decision in this case, to perhaps prepare briefs to hand to your Honor?

The Court: I have considered that matter Mr. Ezra. I see no reason for briefs at this time. This is a new section of the law. As a matter of fact, the guide lines for the section were laid down by the Court of Appeals in People against Kahan in 15 N.Y. 2d. That decision was made in March of 1965, in which the Court of Appeals of this State, [fol. 395] very clearly set forth certain guidelines for future legislation. Thereafter, rather promptly, the State Legislature repealed former Section 484(h) and enacted this new section.

It is apparent to the Court that the new legislation was an attempt on the part of the State Legislature to conform to the guidelines laid down by the Court of Appeals. Therefore, I consider that all the cases that you have submitted to me and which I have read concerning obscenity and pornography and constitutional freedoms are not controlling with respect to this new legislation.

So that this Court faces the not unusual position of interpreting a new section of the law enacted by the State Legislature and with which I will struggle, to the best of my ability. But, I do not think there is any reason to delay this matter for the submission of briefs because the best case on the subject has already been decided so far. That is the People against Kahan by the Court of Appeals of this State.

[fol. 396] There will be a short recess. Everybody will keep themselves available.

(Whereupon there was a short recess.)

The Court: Is the defendant present in the courtroom?

Mr. Ezra: Yes, your Honor.

Decision

The Court: You may be seated, Mr. Ginsberg. You are evidently under some strain.

Now, after considering all the evidence offered in the trial of both of these cases, the Court finds as follows:

The Court finds that Section 484(h) of the Penal Law is a new provision of law enacted by the Legislature of this State by the laws of 1965, effective September 1, 1965. This section is designed to protect minors under the age of 17 years of age from material that would be harmful to them and unsuitable for them.

It is apparent that it was the intention of the Legislature to protect minors of high school and junior high school age in fixing the limitation at 17 years. Those being the ages which are an age of awakening of sex desires, but [fol. 397] also an age where the minors have insufficient maturity to deal with and to properly evaluate the plethora of material dealing with illicit sex, lust, passion, depravity, nudity and immorality.

The guidelines for the regulation and supervision of such material which may be sold to minors in the aforesaid age group has been set forth by the Court of Appeals in this State in People against Kahan, 15 N.Y. 2d, 311. The Court of Appeals of this State has indicated that this is an area which the People of this State can regulate through legislation without violating any constitutional freedoms.

The major issue in both these cases is not obscenity or pornography which are provided for in other sections of the Penal Law, but rather, is the material harmful to minors as defined in Section 484(h) of the Penal Law.

I find that the People have proven beyond a reasonable doubt that Richard Lance Corey on October 18, 1965 and October 26, 1965 was 16 years of age. That the defendant knew or had reason to know that Richard Lance Corey was under 17 years of age. That People's Exhibits 2, 3, 4 [fol. 398] and 5 contained pictures and photographs depicting female nudities as defined by the aforesaid section. Further, that People's Exhibit 5 and People's Exhibit 3 contained verbal descriptions and narrative accounts of sexual excitement and sexual conduct.

I find that the material as above set forth is harmful to minors in that I find that these photographs and articles are accounts which predominantly appeal to the prurient, shameful and morbid interest of minors and that in considering the adult community as a whole, is wholly unsuitable material for minors under 17 years of age.

I further find that Richard Lance Corey purchased People's Exhibit 2, 3, 4 and 5 from the defendant Sam Ginsberg and paid a monetary consideration therefor.

I find that the defendant Sam Ginsberg knew the character and contents of People's Exhibit 2, 3, 4 and 5.

I further find that the defendant Sam Ginsberg knew that Richard Lance Corey purchased these specific maga-
[fol. 399] zines in evidence in these cases as People's Exhibits 2, 3, 4 and 5.

I therefore find that the defendant Sam Ginsberg is guilty of both counts of the charges set forth in CR3119 and guilty of both counts of the charges set forth in CR3125.

Now, with respect to both of these charges of which the Court has found the defendant guilty, the Court is going to defer sentence to May 18, 1966 before this Court, wherever this Court may be sitting, pending receipt of a probation report.

Now, I understand the defendant has been up to now released in his own custody on both cases.

Mr. Ezra: Yes, your Honor.

The Court: Now, Mr. Ginsberg, will you stand please? Do you understand what the Court has said up to now, Mr. Ginsberg?

The Defendant: Yes.

The Court: Do you understand that I am deferring sentence in both these cases until I get a report from the Probation Department of this County and that is important because of your past record, etc. It will have a weight in
[fol. 400] the Court's considering what sentence to pass with respect to your case. Since the Trial Court is thoroughly familiar with all the facts involved in this case, the

Trial Court has specifically stated that sentence shall be by Judge Chinman on May 18th.

Now, under all the circumstances, Mr. Ginsberg and since you are a resident of the community, you are married, you have three children, you are in business, you have been heretofore been released in your own custody without bail. I am going to continue that. I am releasing you in your own custody until May 18th, with the understanding that you must appear here or wherever I may be sitting at that time and you, Mr. Ezra, will ascertain exactly where I will be at 9:30 in the morning.

Now, if you fail to appear, Mr. Ginsberg, then I warn you, you may be guilty of breaking parole and you may subject yourself to further or additional punishment. Do you understand that?

The Defendant: I do.

The Court: Would you inform the attorney for the de- [fol. 401] fendant the necessary procedure he may take to get in touch with the Probation Department of Nassau County.

Mr. Ezra: May I, your Honor, of course take exception to the findings of the Court and may I ask the indulgence of this Court in setting some date other than the 18th or the 19th for sentence, in view of the fact that I have other matters on my calendar in other counties for those two days. The 20th would be fine, your Honor.

The Court: I will have to start counting all over again. I will make it the 17th.

Mr. Ezra: The 17th is fine.

The Court: Then I know I am within the time limit. May 17th.

Mr. Ezra: Yes, your Honor. Thank you very much.

The Court: I am changing the date to May 17th, Mr. Ginsberg.

The Defendant: Thank you.

I certify that the within transcript is true and accurate.

Robert J. Hellman, Official Reporter.

[fol. 401a]

IN DISTRICT COURT OF NASSAU COUNTY

STATE OF NEW YORK, FIRST DISTRICT

[Title omitted]

Before: Hon. Julius Chinman, District Court Judge.

Civil Part IV
First District Court
East Wing, Old Country Road
Mineola, New York

TRANSCRIPT OF TRIAL—May 17, 1966

APPEARANCES:

Morris J. Ezra, Esq., Attorney for the Defendant, 253 Broadway, New York, New York.

Reported by: Robert J. Hellman, Official Reporter.

[fol. 402]

SENTENCE

The Court: Mr. Ginsberg, you have been charged with a violation of Section 484 subdivision h subdivision 2(a) of the Penal Law 2(b) of the Penal Law, two counts and a violation of Section 484 subdivision h subdivision 2(a) and section 484 subdivision h subdivision 2(b) of the Penal Law, two counts. You have been found guilty on all four counts.

Now, Mr. Ezra, do you have any legal cause to show why judgment should not be pronounced?

Mr. Ezra: No, your Honor.

The Court: Is there any statement you wish to make to the Court?

Mr. Ezra: I do, your Honor.

The Court: Go ahead.

Mr. Ezra: Very recently, within the last two or three days, this defendant has been in touch with me and has

informed me of the fact that the Police Department of Nassau County has distributed a leaflet, sir, in all of the stationery stores in which they have warned stationery store owners, magazine sellers and so on, of the fact that it is against the law to sell publications such as the books involved in this particular case to minors and they have cited in that statement the fact that your Honor has re-
[fol. 403] cently found a person guilty of such a charge, without mentioning the name which I thought was an honorable thing to do.

I bring this up, your Honor, because at the time that the law passed and if you remember, I said to your Honor, that the law was 40 days old at the time that this occurrence took place, that this man had no knowledge whatever of such a law. The publishers did not give him any notice or warning of any kind, such as the cigarette people did when they distributed notice to all of the people who sell their products, that it is not to be sold to minors and so on and it is after, of course, the man was convicted that other people are given the opportunity of not being convicted by being notified of the existence of such a law. Especially at that time when the law was so new, Mr. Ginsberg had no way of knowing, without some kind of notice similar to that being given to the other people, that there was such a law.

So that I believe, your Honor, that that is a mitigating circumstance and now furthermore, I believe that your Honor was just and fair in his evaluation of this defendant and I think I quote your Honor's own words when I say [fol. 404] that your Honor had stated that this defendant is not the criminal type.

Your Honor knows from the probation report that he is a married man; that he has children; that he is a hard worker and I believe that I can say without fear of contradiction, that he did not know what he was selling at the time that he was selling it. It is an unfortunate circumstance and I believe that your Honor, in the exercise of his

clemency here should certainly give every possible thought to this man insofar as being lenient is concerned.

The Court: Thank you very much, sir.

Mr. Ginsberg and Mrs. Ginsberg, I am not going to keep you in suspense. I am not going to send you to jail. I am not even going to fine you. I want you to understand that right away so you can listen to what I have to say with perhaps some feeling of relief.

The Defendant: Thank you.

The Court: I quite agree with Mr. Ezra, although technically, ignorance of the law is no defense in a legal case. I quite agree with Mr. Ezra that it is very probable that you did not have any actual knowledge of the enactment of this [fol. 405] law at the time it was passed by the State Legislature. I feel quite certain that very likely a very large percentage of business people who operate stores of similar type of yours or other stores that have magazine displays are or were in ignorance of the situation.

I am also aware that very possibly your contractual obligations with the distributors of these magazines leaves you no choice with respect to receiving them, but I must call your attention to the fact that you still have a great deal of choice as to how you handle them.

Now, the Court knows—the Court has read these magazines rather thoroughly, all the magazines that were in this particular case and has even gone through the trouble of reading magazines that were not in the case which are, shall I say, typical of the type of merchandise that are within the covers of these magazines and the Court can perhaps use a great deal of adjectives in describing the contents thereof. The thinly disguised scientific treatise. The alleged art displays that are contained within the covers of the magazines.

I am not going to try and characterize them because we will confuse the issue.

[fol. 406] The issue in these cases is simply one of selling magazines or other material which are harmful to minors.

I note that you have a 16 year old daughter, Mr. Ginsberg.

The Defendant: She was just 16.

The Court: I seriously doubt whether you would care to have your 16 year old daughter spend her evenings reading the magazines that were in this case. I do not think so. So that in suspending sentence on you, Mr. Ginsberg, it is unfortunate that you were the particular person who was involved in this situation, when we have perhaps hundreds or maybe thousands or several thousand storekeepers in the State of New York, that you should be the first one.

In suspending sentence on you, I feel in a way, and if you have any way of letting people know, Mr. Ezra, I am suspending sentence on every merchant that sells these magazines.

Now, the Police Department of Nassau County is doing a particularly good job. I am aware of the fact that the Police Department is distributing these leaflets or pamphlets to the various storekeepers because they came in and [fol. 407] asked me if they could use, "part of my decision."

The other day my wife came home and she remarked about the fact that she walked into our local stationer who did not understand what it was all about and she had to explain it to him and she told him very simply. She said, "Look, you are not allowed to sell cigarettes to people under 18 years of age. Saloonkeepers cannot sell liquor to people under 18 years of age. Liquor or package stores cannot sell liquor to people under 18 years at all. All you have to do is not sell these magazines to anybody under 17." This is your job.

I think that you, Mr. Ginsberg and you, Mrs. Ginsberg, will quite agree with me that although people feel why should I be the one that was picked here; why should I be chosen, you will agree with me that as human beings we not only have a legal obligation to obey the law, but in this type of case, we have some type of moral obligation too. We do not want our 14, 15, 16 year olds exposed to this type of merchandise.

So, Mr. Ginsberg, I am suspending sentence on all counts in both cases. I am sure that you understand.

Incidentally, I got some very nice letters from your [fol. 408] Rabbi, from other people. You are held in very high esteem in the community. Both of you are. It is a matter of regret to me that perhaps I was compelled to hold you in suspense because I wanted to be sure of the type of person with whom I was dealing and that is why I told you immediately, before I started to talk to you, that I said that I am not going to punish you.

Sentence suspended on all counts.

Good luck to you.

Mr. Ezra: May I make one statement, if your Honor please?

The Court: Yes, sir. It will not be redundant?

Mr. Ezra: No. I am positive of that.

This young boy who testified, the Corey child—

The Court: (Interposing) I do not want to get into the facts, Mr. Ezra. Please. I do not want to hear anything about Mr. Corey or anyone else.

Mr. Ezra: These are the facts—

The Court: (Interposing) Mr. Ezra, I think we will leave the subject alone.

Mrs. Ginsberg: May I say something?

The Court: Yes.

[fol. 409] Mrs. Ginsberg: Specifically, this boy keeps coming into the store and taunting us with his—

The Court: You have a right not to let him in the store.

Mrs. Ginsberg: Do we have a right?

The Court: Yes. Talk to Mr. Ezra. You have a right not to let anybody in the store who is objectionable. I think the manager of some supermarket is keeping some kids out of his store.

The Defendant: After the case, he came in on a Saturday morning or Saturday afternoon.

The Court: I will see what I can do about it.

I certify that the within transcript is true and accurate.

Robert J. Hellman, Official Reporter.

[fol. 410]

IN THE DISTRICT COURT OF THE COUNTY OF NASSAU

FIRST DISTRICT

Held at Mineola

COURT OF SPECIAL SESSIONS

CR 3119/65

THE PEOPLE OF THE STATE OF NEW YORK,

against

"JOHN DOE" a/k/a SAM GINSBERG.

May 17th 1966

CERTIFICATE OF CONVICTION—May 17, 1966

The above named "John Doe" a/k/a Sam Ginsberg having been brought before Hon. Julius Chinman, Judge, District Court of the County of Nassau, New York, holding a Court of Special Sessions, charged with

Viol. sec. 484-h sub 2(a) PL
Viol sec. 484-h sub 2(b) P. (2 counts)

And, having thereupon pleaded not guilty and demanded a jury, and having been thereupon duly tried, and upon such trial duly convicted. It is adjudged that—Sentence be suspended (both counts).

Dated at Mineola, Nassau County, N. Y., this 17th day of May, 1966.

Julius Chinman, Judge, District Court of the County of Nassau, Holding a Court of Special Sessions.

State of New York,
County of Nassau, *ss.*:

I certify that I have compared the above with the original Certificate of Conviction made and signed by me as a Court of Special Sessions, and that the same is a correct copy thereof and transcript therefrom and of the whole thereof.

Dated at Mineola, Nassau County, N. Y., this 17th day of May, 1966.

Julius Chinman, Judge, District Court of the County of Nassau, Holding a Court of Special Sessions.

[fol. 411]

IN THE APPELLATE TERM OF THE SUPREME COURT
OF THE STATE OF NEW YORK
SECOND JUDICIAL DEPARTMENT

CR No. 3125-65

THE PEOPLE OF THE STATE OF NEW YORK,
—against—
SAM GINSBERG, Defendant.

NOTICE OF APPEAL—May 19, 1966

Sir:

Please Take Notice that the defendant, Sam Ginsberg, above named, hereby appeals to the Appellate Term of the Supreme Court, Second Judicial Department, from a judgment of the District Court, Nassau County, rendered on the 20th day of April, 1966, convicting said defendant

of violation of Section 484(h), Subdivision 2(a) and 2(b) of the Penal Law of the State of New York, and from the sentence imposed on May 17, 1966, and from each and every part thereof.

Dated: New York, New York, May 19, 1966.

Yours, etc.,

Morris J. Ezra, Attorney for Defendant, Office & P. O. Address, 253 Broadway, Borough of Manhattan, New York, New York 10007.

To:

William Cahn, Esq., District Attorney, Nassau County, County Courthouse, Mineola, New York.

To:

Clerk, First District Court, Criminal Part.

[fol. 412]

AFFIDAVIT OF SERVICE BY MAIL

State of New York,
County of New York, *ss.*:

Lillian Gutstein, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at Brooklyn, N. Y. That on the 25 day of May, 1966 deponent served the within notice of appeal (2 copies) upon Hon. William Cahn, District Attorney of Nassau County, attorney for People in this action, at County Courthouse, Mineola, N. Y., the address designated by said attorney for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care and custody of the United States post office department within the State of New York.

Sworn to before me, this 25 day of May 1966.

Lillian Gutstein

Morris J. Ezra, Notary Public, State of New York, No. 306219148, Qualified in Nassau County, Term Expires March 30, 1968.

[fol. 413]

At a term of the Appellate Term of the Supreme Court, held in and for the Second Judicial Department at the Borough of Brooklyn, on the 20th. day of January, 1967.

Present—Hon. Charles Margett, Jacob J. Schwartzwald, John E. Cone, Justices.

Cal. No. 410—Nov. 1966

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,

vs.

SAM GINSBERG, Appellant.

JUDGMENT—January 20, 1967

The above named Sam Ginsberg, the defendant herein, having appealed to the Appellate Term, Supreme Court from a judgment of conviction of the District Court of the County of Nassau at Mineola, rendered on the 17th. day of May, 1966, after a trial convicting him of a violation of Section 484-H, sub-divisions 2(a) and 2(b) of the Penal Law, (Two Counts on Each), and imposing sentence as follows:

Sentence Suspended,

and the said appeal having been argued by Mr. Emanuel Redfield, of counsel for the appellant, and submitted by Mr.

George Danzig Levine, of counsel for the respondent, and due deliberation having been had thereon;

It is hereby ordered and adjudged that the judgments of conviction so appealed from be, and the same are hereby, affirmed.

J. C., J.S.C.

[File endorsement omitted]

[fol. 414]

At a Term of the Appellate Term of the Supreme Court of the State of New York, held in and for the Second Judicial Department, held in the Borough of Brooklyn, City of New York, on the 30th day of January, 1967.

Present:

CHARLES MARGETT,
JACOB J. SCHWARTZWALD,
JOHN E. CONE,

Justices.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,

—against—

SAM GINSBERG, Appellant.

ORDER AMENDING JUDGMENT—January 30, 1967

The above named appellant having moved this court for an order, certifying that certain constitutional questions were raised by him on this appeal and necessarily passed upon by this court, and no opposition to said application appearing

Now on reading and filing the affirmation of Emanuel Redfield, dated January 20, 1967 and the notice of motion dated January 20, 1967 and due deliberation having been had thereupon, it is

Ordered, that the order of affirmance of this court is deemed amended to incorporate therein the following:

[fol. 415] Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, viz: Defendant contended that Section 484-h of the Penal Law of the State of New York is in violation of the Constitution of the United States as inhibiting the freedom of the press and that it is vague and uncertain. This Court held that the statute is not repugnant to the Constitution of the United States for either of the grounds urged.

Enter:

J. C., J. S. C.

[fol. 416] Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 417]

IN THE STATE OF NEW YORK
COURT OF APPEALS

Before: Hon. John F. Scileppi, Associate Judge.

CR 3119/65

CR 3125/65

THE PEOPLE OF THE STATE OF NEW YORK,

against

SAM GINSBERG.

CERTIFICATE DENYING LEAVE—January 24, 1967

I, John F. Scileppi, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that,

[File endorsement omitted]

upon application timely made by the above named appellant for a certificate pursuant to §520 of the Code of Criminal Procedure, and upon the record and proceedings herein, there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Kew Gardens, New York, January 24, 1967.

John F. Scileppi, Associate Judge.

[fol. 418]

DISTRICT COURT OF NASSAU COUNTY

FIRST DISTRICT

THE PEOPLE OF THE STATE OF NEW YORK,

—against—

SAM GINSBERG, Defendant.

NOTICE OF APPEAL—Filed January 24, 1967

Sir:

I. Notice is hereby given that the above-named, Sam Ginsberg, hereby appeals to the Supreme Court of the United States from the final judgment of the Appellate Term of the Supreme Court of the State of New York, Second Judicial Department, dated the 20th day of January, 1967. This appeal is taken pursuant to 28 U.S.C., Section 1257(2).

II. The clerk of this court will please prepare a transcript of the record of this cause for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript, the following:

1. This Notice of Appeal and proof of service thereof;
2. The judgment of affirmance of the Appellate Term, Second Judicial Department, affirming the judgments of conviction;
3. The Information and judgments of conviction endorsed thereon;
4. The minutes of the trial of the defendant;
5. Exhibits 2, 3, 4 and 5 (the magazines);
6. The order of Judge Scileppi denying leave to appeal;

[fol. 419] III. The following questions are presented by this appeal:

1. Is Section 484-h of the Penal Law of the State of New York on its face and as applied repugnant to the Constitution of the United States because it is an invalid restraint of expression under the Constitution?

2. Is Section 484-h of the Penal Law of the State of New York on its face and as applied repugnant to the Constitution of the United States because it denies the defendant of due process of law in being vague and uncertain?

Dated: New York, New York, January 24, 1967.

Emanuel Redfield, Attorney for Defendant, Office & P. O. Address, 60 Wall Street, New York 5, New York, HAnover 2-1023.

[fol. 420]

DISTRICT COURT OF THE COUNTY OF NASSAU

FIRST DISTRICT

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff,

—against—

SAM GINSBERG, Defendant.

Certificate of Service (omitted in printing).

[fol. 421] [File endorsement omitted]

[fol. 422]

SUPREME COURT OF THE UNITED STATES

No. 1022—October Term, 1966

SAM GINSBERG, Appellant,

v.

NEW YORK.

Appeal from the Appellate Term of the Supreme Court of the State of New York, Second Judicial Department.

ORDER NOTING PROBABLE JURISDICTION—June 12, 1967

This case having been submitted and considered by the Court, probable jurisdiction is noted and the case is placed on the summary calendar. This case is set for oral argument immediately following Nos. 1109 and 1155.

FILED
FEB 1 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. ... [redacted] 47

SAM GINSBERG,

Appellant,

against

THE STATE OF NEW YORK,

Appellee.

ON APPEAL TO THE APPELLATE TERM OF THE SUPREME COURT OF THE STATE OF NEW YORK, ~~First~~ Second JUDICIAL DEPARTMENT

STATEMENT AS TO JURISDICTION

EMANUEL REDFIELD,
Counsel for Appellant,
Office & P. O. Address,
60 Wall Street,
New York, New York 10005.
Tel.: 212 HAnover 2-1023

On the Statement:

EMANUEL REDFIELD,
WILLIAM K. FRIEDMAN,
BENJAMIN E. WINSTON.

TABLE OF CONTENTS

	PAGE
Opinion Below	1
Jurisdiction	2
Statute Involved	3
Questions Presented	3
Statement	4
Stage and Manner of Raising Federal Questions	7
The Questions Are Substantial	7
The Statute is Vague	12
Conclusion	14
Appendix A	15
Appendix B	16
Appendix C	18
Appendix D	19

Table of Cases

Bacon v. Texas, 163 U. S. 207	3
Butler v. Michigan, 352 U. S. 380	10
Cole v. Arkansas, 333 U. S. 196	6
Interstate Circuit Inc. v. City of Dallas	12

PAGE

Jacobellis v. Ohio, 378 U. S. 184 12

Kingsley International Pictures Corp. v. New York, 360 U. S. 684 ..... 7, 8

Mishkin v. New York, 383 U. S. 502 ..... 7, 9

Niemotko v. Maryland, 340 U. S. 268 3

Paramount Film Dist. Corp. v. Chicago, 172 F. Supp. 69 11

People v. Tanenbaum, 18 N. Y. 2d 268 2

People v. McCarthy, 250 N. Y. 358 3

Roth v. United States, 354 U. S. 476 ..... 7, 8, 9

Smith v. California, 360 U. S. 147 11

Stromberg v. California, 283 U. S. 359 14

The Bookcase, Inc. v. Broderick, 18 N. Y. 2d 71 ..... 2, 12

STATUTES

Section 484-h of the Penal Law 3, 19

BOOKS

Lockhard & McClure, "Censorship and Obscenity" .. 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. .....

SAM GINSBERG,

Appellant,

against

THE STATE OF NEW YORK,

Appellee.

ON APPEAL TO THE APPELLATE TERM OF THE SUPREME COURT OF THE STATE OF NEW YORK, ~~First~~ Second JUDICIAL DEPARTMENT

STATEMENT AS TO JURISDICTION

Appellant appeals from a final judgment of the Appellate Term of the Supreme Court of the State of New York, ~~First~~ Second Judicial Department, entered January 20, 1967, which affirmed the judgments of conviction of the defendant, and submits this Statement to show this court that it has jurisdiction on the appeal and that a substantial question is involved.

Opinion Below

The Appellate Term did not write an opinion (although it did certify that the constitutional questions involved were raised and passed upon by it as will hereafter ap-

pear). The trial court did not write an opinion, although it did express itself at length at the trial (Steno. minutes, pp. 394-399; 404-408).

Jurisdiction

(i) This case arises from judgments of the District Court of the County of Nassau, First District, dated May 17, 1966 which convicted the appellant of violating Section 484-h of the Penal Law of the State of New York by selling four magazines to a person under 17 years of age. He was charged in each of two separate informations of having sold two of the magazines to the same minor. After an extensive trial the appellant was found guilty of the charges and his sentence was suspended. He appealed from the judgments of conviction to the Appellate Term of the Supreme Court of the State of New York, Second Judicial Department, which affirmed the convictions by its judgment dated and entered January 20, 1967. A copy of said judgment is annexed hereto as Appendix A. That court by its order dated January 30th, 1967 amended its judgment to certify that the federal questions here presented were presented to that court and necessarily passed upon. A copy of said order is annexed hereto as Appendix B.

Application was made on January 24, 1967, as provided by Section 520 of the Code of Criminal Procedure of New York, to a judge of the Court of Appeals of the State of New York, for permission to that Court from the Appellate Term. Such permission was refused on the ground that no question of law was involved which should be reviewed. That Court, just a few months ago, had passed upon the federal constitutional validity of the statute in *The Bookcase Inc.* v. *Broderick,* 18 N. Y. 2d 71 (July 7, 1966) and *People* v. *Tanenbaum,* 18 N. Y. 2d 268 (September 29, 1966). These were urged and considered upon the application. A copy of the certificate of Judge Scileppi

dated January 24, 1967, showing his denial of the timely application is annexed hereto as Appendix C.

Under New York law, the refusal of the first judge of the Court of Appeals to whom such an application is made is deemed an exhaustion of all remedies of further appeal in the State, *People* v. *McCarthy,* 250 N. Y. 358. Hence, the Appellate Term is the last court of resort in New York in which a judgment could be had. *Bacon* v. *Texas,* 163 U. S. 207, 215; *Niemotko* v. *Maryland,* 340 U. S. 268; Sections 517, 520, Code Criminal Procedure, Art. 6, Sect. 8, State Constitution, section 2018 Uniform District Court Act.

(ii) The judgment of affirmance appealed from was made and entered on January 20, 1967.

The Notice of Appeal was filed in the office of the Clerk of the District Court of Nassau, First District, the court possessed of the record, on January 24, 1967.

(iii) Jurisdiction of this appeal is conferred on this court by 28 U.S.C., Section 1257(2).

Statute Involved

The statute involved is Section 484-h of the Penal Law of the State of New York (Volume 39 McKinney's Consolidated Laws of New York Annotated; Laws of 1965, Chapter 327) which is set forth in Appendix D.

Questions Presented

1. Is Section 484-h of the Penal Law repugnant to the Constitution of the United States in that its operation and effect is to restrain expression in violation of the First and Fourteenth Amendments?

2. Is Section 484-h of the Penal Law repugnant to the Constitution of the United States in that it denies due

process of law by the vagueness and uncertainty of its provisions?

3. Considering the aforesaid objections to the statute should not the judgments of conviction of the appellant have been reversed and the informations dismissed?

Statement

The prosecution was commenced by an information which charged that on October 18, 1965 in Bellemore, New York, the defendant in violation of Section 484-h of the Penal Law sold two magizines, "Mr. Annual" issue of "Fall 1965" and "Sir" issue of December 1965 to Richard Lance Corey, 16 years of age and that the magazines contained pictures of persons and portions of the human body which depict nudity and which as a whole are harmful to minors.

Another information alleged that on October 26, 1965 the defendant at the same place sold to the same minor two magazines, "Man to Man" issue of January 1966 and "Escapade" issue of December 1965, and which contained pictures of persons and portions of the human body which depict nudity, and which taken as a whole is harmful to minors.

The defendant on the dates in question operated and still operates, a stationery candy and luncheonette called, "Sam's Luncheonette" at 1507 Bellemore Avenue, Bellemore, New York (minutes, p. 89). He sold magazines, newspapers, cigars and lunch and "everything else" (minutes, pp. 53, 131). He and his wife conducted the business (243). The store is about 30 feet deep and 7 feet wide (103).

On October 18, 1965, the minor, whose mother testified he was 16 years of age, entered and purchased "Sir" and "Mr. Annual", for which he said he paid the defendant, holding the magazines out flat and while the defendant was

busy at the lunch counter (35, 37, 80, 85, 86). The purchase was made at the instigation of the parents of the boy (39, 41). There was evidence by the appellee that prior to October 18, 1965 the mother of the boy visited the store and scolded aloud in the presence of the defendant that magazines of the character of the ones in this case were being sold to her son of 15 years of age (92, 96, 105). Appellee also presented evidence that the minor had a conversation with appellant in his store about October 12, 1965, in which he had advised Ginsberg to put the rack of magazines behind the counter so he wouldn't "get in trouble with the law" and that he had told Ginsberg that he was 16 years of age (89, 92).

The purchase of the two magazines was made on October 26, 1965 at the instigation of a police officer (42). At that time the defendant was behind the counter busy with cigarettes and coffee (255). He is usually so busy in the store that he cannot possibly police all activities (310, 311, 314).

The uncontradicted testimony, among others, of Ginsberg, was that he operates the store with his wife (243, 308). He buys these magazines from G.N.S. News, a distributor, from whom he has no choice as to the magazines—they are all lumped together with other publications sent to him twice a week automatically, without ordering them (243, 244, 250). He carries about 200 titles of magazines in his store (296).

The prosecution came on for trial on April 18, 1966 before District Court Judge Julius Chinman, without a jury. After a trial he adjudged the appellant guilty on all charges on May 17, 1966 and suspended sentence (394, 404). He made the following findings:

1. That Richard Corey on October 18, 1965 and October 26, 1965 was 16 years of age.

2. The defendant knew or had reason to know that Richard Corey was under 17 years of age.

3. All the magazines in question contained pictures of nudes.

4. "Escapade" and "Mr. Annual" contained verbal descriptions and narrative accounts of sexual excitement and sexual conduct.

5. The material is harmful to minors in that the photographs and accounts appeal to the *prurient, shameful and morbid interest* of minors (emphasis supplied).

6. Considering the adult community as a whole, the material is wholly unsuitable for minors under 17 years of age.

7. That a monetary consideration was paid for the purchase by Richard Corey of the magazines from the defendant.

8. The defendant knew the contents and character of the magazines (397-398).

Findings 4 and 5, that the magazines contained "verbal descriptions" and "accounts", are immaterial, as the informations only alleged that the magazines contained nude pictures. In the context of this case, it is the charge alone that controls, *Cole* v. *Arkansas*, 333 U. S. 196, 198.

The appellant appealed from the judgments to the Appellate Term of the Supreme Court of the State of New York, Second Judicial Department. That court, on January 20, 1967, affirmed the judgments.

Appellant applied to a judge of the Court of Appeals of New York for leave to appeal to that court, but permission was refused (Appendix C). Appellant thus exhausted all state remedies open to him.

The Appellate Term by its order certified that appellant raised in that court and that court necessarily passed upon the federal questions presented in this appeal (Appendix D).

Stage and Manner of Raising Federal Questions

The questions here presented were raised in the Appellate Term and passed upon there (Appendix B).

The questions were raised at the trial by a motion to dismiss the informations on the ground that the statute was repugnant to the Constitution of the United States (3-8). The motion was denied (19-20). The motion was renewed at the end of the prosecution's case and again denied and again at the end of the entire, with a similar ruling (158, 184, 384, 396).

The Questions Are Substantial

The judgment below should be reviewed because it rests on a statute whose validity under the Constitution of the United States has not been passed upon by this court. Nor has this court ever passed upon the additional question of vagueness and overreach of the statute.

This court has never passed upon the question whether a statute is compatible with the First Amendment if it prohibits distribution of specified literature to persons under a certain age, in this case under the age of 17. In *Roth* v. *United States,* 354 U. S. 476, this court held that only obscene literature may be forbidden from circulation. But even then the obscenity may be determined by its effect upon the "average" person. See also *Kingsley International Pictures Corp.* v. *New York,* 360 U. S. 684. In *Mishkin* v. *New York,* 383 U. S. 502, this court modified *Roth* to the extent of broadening the criterion of pruriency

by judging its effect upon the group to which the literature is *directed*.

The statute in question does not use the word obscenity. The showing of the "human buttocks" or "showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple" (sub. 1(b)) is sufficient for conviction under the statute if it is in a photograph or magazine (subs. 2(a), 2(b)) and "knowingly" sold to a person under 17 years (sub. 1(g), sug. 3 and sub. 1(a)) provided the material is "harmful to minors" as defined in subdivision 1(f) when it appeals to the prurient, shameful and morbid interest of minors, is patently offensive to prevailing standards in the adult community with respect to what is suitable material to minors and is utterly without redeeming social importance for minors.

Although the statute studiously avoids the word obscenity (evidently to escape from the complexity of defining "obscene for minors", what with the difficulty in defining what is obscene for adults), it is an inescapable conclusion that the statute in general condemns literature which although not obscene for adults, may be obscene for persons under 17.

But the omission of the label does not satisfy the constitutional strictures against restraints against the press. This court has construed the Constitution so as to allow a "tiny bit" of restraint when it can be shown that the material is obscene in that it appeals to the prurient interest of the average adult community.

In *Kingsley International Pictures Corp.* v. *New York*, 360 U. S. 684, the court held that the only publications that may be the subject of restraint by the legislature are those that are "obscene". This clearly means what it says—that all other expression is free from any restraint by the state. And in *Roth* v. *United States*, 354 U. S.

476, the court held that obscenity, is to be determined by its effect upon the "average" person. By the statute involved in this case, an exception is sought to be made in that the reading of literature may be regulated depending on what literature a legislature may deem harmful to a certain category of readers.

Does the Constitution yield when the distribution is made to a person under a certain age? If so, then the constitutional interdiction is rendered meaningless. If censorship is forbidden, how can it be approved because of the age of the reader? If the legislature may forbid specified literature to persons under a certain age, it would logically follow that the legislature may select the literature.

Since this court has held that only obscene literature of the kind prurient to adults may be proscribed, then the statute runs counter to that pronouncement, and should be decisive.

But it may be urged that there may be room for "variable obscenity", that is, obscenity dependent upon the reader. See, *Mishkin* v. *New York,* 383 U. S. 502, 508. This of course is a return to the *Hicklin* rule which was expressly discarded by *Roth* v. *United States,* 354 U. S. 476. To overcome that inconsistency *Mishkin* makes clear that the material in question must be "designed" for distribution to a susceptible audience.

There is no evidence in this case that the magazines in question had such a design. Obviously, the magazines are adult orientated.

Another difficulty with the statute is the enormous burden placed on the small store operator, as the facts in this case amply illustrate.

Lockhart and McClure, writing in "Censorship and Obscenity: The Developing Constitutional Standards", 45 Minn. 5, 86, conclude: "For these reasons, we suspect

that the Supreme Court might well invalidate statutes designed to deny a peripheral adolescent audience access to books and magazines aimed at a primary audience of sexually mature adults, because of the tendency to reduce adult reading material to a level suitable for adolescents". The operation of such a statute by its effect produces the result, says Lockhart and McClure, against which this court spoke in *Butler* v. *Michigan*, 352 U. S. 380. This effect would be produced by compelling booksellers to segregate such literature and guarding it against intrusion by adolescents. This advertisement against forbidden fruit could only result in attracting more adolescents. The policing problem would become an impossible burden, leading the bookseller to abandon sale even to adults. Thus, the adults would be deprived of such literature, because it was not available for distribution to adolescents. These thoughts, coming from the pen of the architects of the so-called variable obscenity doctrine are indeed impressive.

These statutes are directed against booksellers. The burden on a bookseller to ascertain (a) the nature of the forbidden article and (b) the age of the purchaser, can lead only to timidity on the part of the bookseller, with consequent restraint upon distribution. The average bookseller, be he a newsdealer, stationery vendor or druggist, has little ability, not to mention time, to ascertain whether a given title among hundreds (200 in this case) in his store falls within the ban of the statute. Yet, he must be able to not only overcome the hurdle of whether the books are obscene to the average person, but must also make a judgment whether they meet the complex statutory formulas. And if, after wading through the complexities of both of these statutes (stopping from his duty of making a sandwich for a customer, to consult the statutes for their operation on the prospective book purchaser), he concludes that the statute applies, he then is met with the burden of ascertaining the age of the purchaser. He has the burden

of making a *bona fide* effort to ascertain the age. The statute leaves open what is *bona fide*. The seller is thus placed in jeopardy of a possible prison sentence of one year.

Of course, there is no analogy between this type of a statute and those forbidding the sale of liquor and cigarettes to minors. *Smith* v. *California*, 360 U. S. 147, made clear distinction between material for the stomach and material protected by the First Amendment.

It should be observed that under the statute and as illustrated by the facts in this case fulfillment by the prosecution of the conditions can occur only by a meticulous prearranged plan to "entrap" the small busy stationery-luncheonette owner with the use of a minor as a decoy. The appalling consequences to the minor by employment for such shameful practices probably outweigh any possible benefit sought for minors. In this case, the purchase of the magazines was instigated on the first occasion by the parents of the boy and on the second, by the police. In order to show knowledge of the contents of the material and knowledge of the age, the prosecution presented the testimony of the minor that he had told Ginsberg to keep the rack of magazines behind the counter lest he run afoul of the law. He also testified that he told Ginsberg that he was 16 years of age, although there was no occasion for such disclosure. The boy was coached how to purchase the magazine and to lay a foundation for the arrest of this hard-working and perfectly honorable appellant (minutes, p. 408).

Thus, the appellant stands convicted under judgments (for which he could have been sent to prison for one year on each count) solely because he sold these nationally distributed magazines to a person below an age chosen by the legislature (see, *Paramount Film Distributing Corp.* v. *City of Chicago*, 172 F. Supp. 69, where exhibition of a motion picture to persons "under 21" was held unconstitutional).

Although there was a statement in one of the opinions in *Jacobellis* v. *Ohio,* 378 U. S. 184, reflecting in general upon the validity of distribution to minors of material protected by the First Amendment, the statement did not form the basis of the court's decision. That case cannot be said to dispose of the question here presented. Nor was the question disposed of in *The Bookcase Inc.* v. *Broderick,* —— U. S. ——, 17 L. ed. 2d 11, October 10, 1966, where this court refused to review the appeal in that case, evidently because of the objection urged by the opposition that it involved a hypothetical question, presented through a declaratory judgment (note however, the similar features of the declaratory judgment in *Interstate Circuit, Inc.* v. *City of Dallas* (5th Cir. August 30, 1966), 366 F. 2d 590). The instant case, involving judgments of conviction, is obviously far removed from any possible claim of being abstract.

The Statute is Vague

The trial court found the material prurient, shameful and morbid (minutes, pp. 397-398). It did this to satisfy the definition of "harmful to minors".

1. "Harmful to minors", as sought to be defined, overreaches itself: It is not limited to prurient appeal. It also proscribes literature that predominantly appeals to the "shameful" and "morbid" interest of minors.

This statute makes possible the convictions of a person because of a sale or showing to a minor of pictures or magazines containing pictures of nudes such as Goya's, "Maja", and Rembrandt's, "Bathsheba". If a court or jury should find that such nudes appeal to the prurient, shameful and morbid interest of minors, and without redeeming value to minors, judgment of guilt would follow. While the nudes in the magazines before the court are not in the same category of art as the paintings mentioned, the question is not a debate on which is greater art. As

to the Goya and Rembrandt many adults may conclude, altho incorrectly, that as to minors, they are prurient, shameful and morbid and not suitable for children.

Once the door of the jail is open however slight by the power of the state, because of judgments as to what is "suitable material for minors" (sub. 1(f)(ii)), it is inevitable that the door will be opened wider and wider as the vagueness of the statutes allows expansion.

2. By the conjunctive statute, the People must also prove that the material is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable for minors. This could have some specificity if it stopped with "patently offensive to prevailing standards in the adult community." But even there it does not say which community. It is Bellemore or the State of New York or the United States? When the statute adds, however, "with respect to what is suitable for minors" it makes the meaning contradictory or at least beyond interpretation. Does it mean that what offends children from an adult's point of view is condemned or does it mean that it is offensive to adults and therefore is to children? Does it mean that the judiciary is ousted from determining what is suitable?

3. The statute speaks of a sale made "knowingly" which includes "reason to know" or "belief which warrants further inspection". We submit that these phrases cannot put a vendor on notice as to what he must do or refrain from doing. The proof must be that the vendor knew the character and content of the material. This is not clear as to whether or not character means that he knew the material was of the kind the statute forbids.

4. The statute inflicts its penalty absolutely unless the defendant shows that he made a mistake after a *bona fide* and "reasonable attempt" to ascertain the age of the pur-

chaser. The statute does not tell the bookseller what effort he must make before he can be excused. Does it require him to get a birth certificate or some other identification or is interrogation of the puchaser sufficient? If the interrogation merely consists of asking the purchaser for his age, would it be sufficient if the purchaser stated he was 18?

Under the doctrine of *Stromberg* v. *California*, 283 U. S. 359, 368, the judgments resting as they do on grounds in which the valid cannot be separated, must be reversed if one ground is invalid. Here, the trial court found the appellant on all grounds alleged in the statute.

CONCLUSION

The questions involved in this appeal are substantial and of public importance; therefore review should be accorded to this case.

Dated: January 30, 1967.

Respectfully submitted,

EMANUEL REDFIELD,
Counsel for Appellant,
Office & P. O. Address,
60 Wall Street,
New York, New York 10005.
Tel: 212 HAnover 2-1023

On the Statement:

EMANUEL REDFIELD,
WILLIAM K. FRIEDMAN,
BENJAMIN E. WINSTON.

APPENDIX A

Cal. No. 410—Nov. 1966

At a term of the Appellate Term of the Supreme Court, held in and for the Second Judicial Department at the Borough of Brooklyn, on the 20th day of January, 1967.

Present—Hon. Charles Margett,
" Jacob J. Schwartzwald,
" John E. Cone,

Justices.

The People of the State of New York,

Respondent,

vs.

Sam Ginsberg,

Appellant.

The above named Sam Ginsberg, the defendant herein, having appealed to the Appellate Term, Supreme Court from a judgment of conviction of the District Court of the County of Nassau at Mineola, rendered on the 17th day of May, 1966, after a trial convicting him of a violation of Section 484-H, sub-divisions 2(a) and 2(b) of the Penal Law (Two Counts on Each), and imposing sentence as follows: Sentence Suspended, and the said appeal having been argued by Mr. Emanuel Redfield, of counsel for the appellant, and submitted by Mr. George Danzig Levine, of counsel for the respondent, and due deliberation having been had thereon;

It is hereby ordered and adjudged that the judgments of conviction so appealed from be, and the same are hereby, affirmed.

J. C.,
J. S. C.

(Seal)

APPENDIX B

At a Term of the Appellate Term of the Supreme Court of the State of New York, held in and for the Second Judicial Department, held in the Borough of Brooklyn, City of New York, on the 30th day of January, 1967.

Present: CHARLES MARGETT,
JACOB J. SCHWARTZWALD,
JOHN E. CONE,
Justices.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

against

SAM GINSBERG,

Appellant.

The above named appellant having moved this court for an order, certifying that certain constitutional questions were raised by him on this appeal and necessarily passed upon by this court, and no opposition to said application appearing

Now on reading and filing the affirmation of Emanuel Redfield, dated January 20, 1967 and the notice of motion dated January 20, 1967 and due deliberation having been had thereupon, it is

ORDERED, that the order of affirmance of this court is deemed amended to incorporate therein the following:

Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, viz: Defendant contended that Section 484-h of the Penal Law of the State of New York is in violation of the Constitution of the United States as inhibiting the freedom of the press and that it is vague and uncertain. This Court held that the statute is not repugnant to the Constitution of the United States for either of the grounds urged.

Enter:

J. J. S.,
J. S. C.

APPENDIX C

STATE OF NEW YORK

COURT OF APPEALS

Before: HON. JOHN F. SCILEPPI, Associate Judge.

THE PEOPLE OF THE STATE OF NEW YORK,

against

SAM GINSBERG

Certificate Denying Leave

I, JOHN F. SCILEPPI, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above named appellant for a certificate pursuant to § 520 of the Code of Criminal Procedure, and upon the record and proceedings herein, there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Kew Gardens, New York, January 24, 1967.

JOHN F. SCILEPPI,
Associate Judge.

APPENDIX D

The Statute

Section 484-h. Exposing minors to harmful materials.

1. Definitions. As used in this section:

(a) "Minor" means any person under the age of seventeen years.

(b) "Nudity" means the showing of the human male or female genitals, public area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state.

(c) "Sexual conduct" means acts of masturbation, homosexuality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, public area buttocks or, if such person be a female, breast.

(d) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(e) "Sado-masochistic abuse" means flagellation or torture by or upon a person clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

(f) "Harmful to minors" means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, when it:

(i) predominantly appeals to the prurient, shameful or morbid interest of minors, and

(ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and

(iii) is utterly without redeeming social importance for minors.

(g) "Knowingly" means having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of both:

(i) the character and content of any material described herein which is reasonably susceptible of examination by the defendant, and

(ii) the age of the minor, provided, however, that an honest mistake shall constitute an excuse from liability hereunder if the defendant made a reasonable bona fide attempt to ascertain the true age of such minor.

2. It shall be unlawful for any person knowingly to sell or loan for monetary consideration to a minor:

(a) any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts nudity, sexual conduct or sado-masochistic abuse and which is harmful to minors, or

(b) any book, pamphlet, magazine, printed matter however reproduced, or sound recording which contains any matter enumerated in paragraph (a) of subdivision two hereof, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sado-masochistic abuse and which, taken as a whole, is harmful to minors.

3. It shall be unlawful for any person knowingly to exhibit for a monetary consideration to a minor or know-

ingly to sell to a minor an admission ticket or pass or knowingly to admit a minor for a monetary consideration to premises whereon there is exhibited, a motion picture, show or other presentation which, in whole or in part, depicts nudity, sexual conduct or sado-masochistic abuse and which is harmful to minors.

4. A violation of any provision hereof shall constitute a misdemeanor. Added L. 1965, c. 327, eff. September 1, 1965.

MAR 29 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term 1966

No. [redacted] 47

SAM GINSBERG,

Appellant,

against

THE STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE APPELLATE TERM OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND JUDICIAL DEPARTMENT.

MOTION TO AFFIRM

WILLIAM CAHN,
District Attorney, Nassau County,
County Court House,
Mineola, New York.

GEORGE DANZIG LEVINE,
Assistant District Attorney,
of Counsel.

INDEX

	PAGE
Statement	1
Facts	2
ARGUMENT:	
The judgments of conviction should be affirmed	2
This Appeal Raises Substantial Federal Questions	10
CONCLUSION	11

Cases Cited

Bookcase Inc. v. Broderick, 49 Misc. 2d 355, aff'd 18 N.Y. 2d 71	8, 9
Butler v. Michigan, 352 U.S. 380	3
Cincinnati v. Coy, 115 Ohio App. 478, N.E. 2d 628 (1962)	6
Communist Party of America v. Subversive Activities Control Board, 367 U.S. 1	8
Jacobellis v. Ohio, 378 U.S. 184	10
Mishkin v. New York, 383 U.S. 502	2, 5, 10
People v. Finkelstein, 11 N.Y. 2d 300 (1962)	5, 6
People v. Harris, 192 Cal. App. 2d 887	6
People v. Sikora, 204 N.E. 2d 768, Ill., 1965	6
People v. Tannenbaum, 18 N.Y. 2d 268	4, 5, 6, 7, 8
People v. Williamson, 207 Cal. App. 2d 839	6
Roth v. United States, 354 U.S. 476	2, 10
Smith v. California, 361 U.S. 147	3, 4, 5, 6, 7, 9, 10
State v. Chobot, 106 N.W. 2d 291, Wisc. 1960	6
U.S. v. Hochman, 277 F. 2d 631	6

PAGE

State v. Jungclaus, 126 N.W. 2d 858, Nev., 1964 6

State v. Onerato, 199 A. 2d 715, Conn. 1963 6

Womack v. U.S., 294 F. 2d 204, cert. den. 365 U.S. 859—1961 6

Statute Cited

Penal Law of The State of New York—Sec. 484-h . . 4, 7, 8, 9

IN THE

Supreme Court of the United States

October Term 1966

No. 1022

SAM GINSBERG,

Appellant,

against

THE STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE APPELLATE TERM OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND JUDICIAL DEPARTMENT.

MOTION TO AFFIRM

Appellee Moves to Affirm the Judgments of Conviction Below

Statement

The appellant appeals from a final judgment of the Appellate Term of the Supreme Court of the State of New York, Second Judicial Department, entered January 20, 1967, which affirmed judgments of conviction against the defendant for violations of § 484-h of the Penal Law of the State of New York perpetrated in selling four "girlie" magazines to a person under 17 years of age.

Facts

The appellant, the operator of a stationery-candy store and luncheonette in Bellmore, New York, was convicted in First District Court, Nassau County, New York, after a trial before Judge Julius Chinman, without a jury, of selling two magazines, "Mr. Annual", Fall 1965 issue and "Sir", December 1965 issue on October 18, 1965, to a 16 year old boy, Richard Lance Corey, and selling on October 26, 1965, to the same boy two additional magazines, "Man to Man" January, 1966 issue and "Escapade" December, 1965 issue. The October 18 sales were charged in one Information and the October 26 sales were charged in a second Information. Both Informations allege, among other things, that the aforesaid magazines contain pictures of portions of the human body which depict nudity.

ARGUMENT

The judgments of conviction should be affirmed.

Although appellee moves to affirm, it concedes that this appeal presents federal questions of substantial character, as maybe seen from its discussion in a later portion of these motion papers.

There is little doubt, in the appellee's view, that the statute here in question is constitutional in its reach and sufficiently definite in its phraseology to meet the requirements of due process since it contains virtually the identical language in which this Court in *Roth* v. *United States,* (354 U.S. 476) defined the concept of obscenity with the slight but necessary adjustments of language needed to relate the *Roth* formulations to the subject of adolescents. The linguistic adequacy of the *Roth* formula was reaffirmed in *Mishkin* v. *New York* (383 U.S. 502). Moreover since this Court sanctioned the concept of "variable obscenity" in *Mishkin,* there would seem to be no constitutional objec-

tion to conditioning criminal liability on a definition of obscenity framed in terms of a recipient group composed of adolescents.

Finally, it is submitted that appellant's argument that the statute in question is constitutionally infirm as an indirect restraint on the dissemination of materials of protected expression to adults within the condemnation of the *Butler* v. *Michigan* doctrine, (352 U.S. 380) will not withstand the examination of practical reason or analytic insight. Appellant's contention in this regard is, in substance, that the statute in question would compel booksellers to segregate the literature within the regulatory comprehension of the statute so as to insure that it would not be sold to adolescents, and to police all sales to determine the age of the buyer. Such a burden of judgment, argues appellant, would weigh so heavily upon the stationery store-luncheonette operator, that he would abandon sales of the literature in question even to adults rather than run the risk of incurring criminal retribution under the statute.

It is submitted that the proof in the record is totally inadequate to support the claim of "indirect restraint" and the general situation of the magazine-selling candy store-luncheonette operator is not so inherently restraining in its objective structure as to permit an *a priori* judgment of indirect restraint.

The concept of indirect restraint received the sanction of this Court in *Smith* v. *California* (361 U.S. 147). Appellant's argument would seem to pose a challenge to the statute on its face, since he appears to argue, in effect, that a mere reading of the scienter provision reveals that, *in operation*, it must necessarily cast upon the seller or distributor within the reach of the statute a burden of inspection so difficult to discharge that he will refrain to some extent from circulating literary materials to adults rather than run the risk of violating the law. This argu-

ment is an attempt to restate the rationale of *Smith* v. *California* (361 U.S. 147), involving a so-called adult obscenity statute, so as to suggest its relevance to the issues in this appeal.

The statute in question, § 484-h of the Penal Law, requires proof of scienter and, in that connection, defines "knowingly" as "having general knowledge of, or reason to know, or a belief or ground for a belief which warrants further inspection or inquiry or both." Thus, it may be seen that § 484-h exacts a demonstration of scienter as to both the *nature* of the publication and the *age* of the buyer as a condition of punishability.

In *Smith* v. *California* (361 U.S. 147), this Court observed that any criminal obscenity law will cause some self-censorship and expressly left open the question of what minimum showing of scienter must be exacted by a prohibitory statute if it is to survive the ordeal of constitutional review. The ordinance in *Smith* did not pass constitutional muster because it dispensed completely with the knowledge requirement regarding the nature of the material in question thus ordaining strict liability. This Court expressly reserved the question of whether some condition of awareness, short of specific apprehension of contents, would suffice to legitimize penal retribution (361 U.S. at pages 154, 155), and the issue of scienter as to age was not in the case.

This Court in *Smith* held that the ordinance in question must be struck down as defective on its face because its enforcement would tend indirectly to restrain the freedoms protected under the First Amendment.

Due process does not dictate that § 484-h must require the Prosecution to show that the defendant had actual knowledge of the contents of the particular magazine in question nor does *Smith* v. *California* hold to this effect (*People* v. *Tannenbaum*, 18 N.Y. 2d 268, 273). In his concurring opinion in *Smith* v. *California* (361 U.S. 147, 162),

Mr. Justice Frankfurter made it clear that a lesser showing was sufficient to satisfy the constitutional requirement of scienter.

Moreover, Mr. Justice Harlan declared that the scienter requirement in obscenity prosecutions may be more relaxed than that required in other types of criminal prosecutions (p. 170).

A reading of *Mishkin* v. *United States*, 383 U.S. 502, reveals that this Court has expressed itself as satisfied to approve a less rigorous evidentiary burden than proof of acquaintance with specific contents. To the same effect are the decisions of the New York Court of Appeals in *People* v. *Tannenbaum* (18 N.Y. 2d 268); *People* v. *Finkelstein* (11 N.Y. 2d 300, 304 [1962]), where the proof fell far short of showing that the defendant had actual knowledge of the contents in question.

These cases suggest that proof of scienter in prosecutions under a so-called adult obscenity statute will be regarded as inadequate to satisfy constitutional standards only in circumstances where the distributor of the book or magazine in question has a large number of works in stock, where the work in question is not well known to common repute, and where there is no indication whatsoever in the evidence that the defendant distributor ever had any contact with or knowledge of any kind about the obscure work in issue or any reason to inquire about it.

Mr. Justice Brennan held in the majority opinion in *Smith* (at page 154) that eyewitness testimony of a bookseller's acquaintance with specific contents is not necessary and that circumstances may warrant the inference that he was aware of what the book in question contained despite his denial. This statement has been interpreted to mean that the Supreme Court was sanctioning the concept of constructive scienter in view of Mr. Justice Brennan's mention of "notice of the character" of the material (at

pp. 152, 154). It can be inferred from the total context of Mr. Justice Brennan's discussion that knowledge of contents may be presumed from knowledge of the "type" of material contained therein, and that perhaps even knowledge of the "type" of material can be inferred from still other circumstances. Most state courts are in accord with the Supreme Court's view in *Smith* that scienter need not be actual but instead may be constructive, that is, inferred from surrounding circumstances. In the state and lower federal court decisions the following circumstances have been held sufficient to justify a finding of scienter.

Titles of the books in question (*Cincinnati* v. *Coy*, 115 Ohio App. 478, 182 N.E. 2d 628 [1962]. In accord *State* v. *Onerato*, 199 A. 2d 715, Conn. 1963; *U.S.* v. *Hochman*, 277 F. 2d 631, 633-34; the *books themselves* (*People* v. *Harris*, 192 Cal. App. 2d 887, in accord, *Womack* v. *U.S.*, 294 F. 2d 204, cert. den. 365 U.S. 859—1961); *Covers of books* (*Cincinnati* v. *Coy, supra; U.S.* v. *Hochman, supra*); *People* v. *Tannenbaum*, 18 N. Y. 2d 268, 270; including photographs on the cover (*State* v. *Jungclaus*, 126 N.W. 2d 858, Nev., 1964) or *drawings or statements* thereon (*People* v. *Finklestein*, 11 N.Y. 2d 300); *advertising material*, even though defendant hadn't seen the books advertised. (*People* v. *Harris, supra; People* v. *Sikora*, 204 N.E. 2d 768, Ill., 1965); the fact that defendant had received complaints or comments (*People* v. *Williamson*, 207 Cal. App. 2d 839); Cursory leafing through magazine without reading it (*State* v. *Chobot*, 106 N.W. 2d 291, Wisc. 1960).

Moreover, the pronouncement of invalidity in *Smith* v. *California* is not applicable here. In that case this Court said, in effect, that absolute or strict responsibility for knowledge of *contents of all materials sold to all persons* was too heavy a burden on the bookseller. Nowhere in *Smith* was it intimated that absolute responsibility to determine the contents of materials *sold only to children*

or to determine the age of prospective purchasers was an excessive burden. As we have seen, § 484-h does not impose absolute responsibility, but there is nothing in *Smith* v. *California* declaring the illegitimacy of such a requirement in a statute involving children.

Thus, the instant situation is fundamentally different from that in *Smith* v. *California*. In *Smith*, not only was there no requirement of scienter in the ordinance in question but there was no showing of scienter at all at the trial.

Appellant's own statement of the trial testimony at the beginning of his brief in the Court below, including *defendant-appellant's* testimony of the trial that he knew when he put the magazines in question in the rack that they were "girlie magazines" and that he had received a complaint from the complainant's mother, clearly indicate that there was sufficient proof of scienter in the trial record herein within the standards approved by Justices Frankfurter and Brennan in *Smith* v. *California*, even if defendant did not know that the purchaser was the son of the complaining mother. Thus § 484-h has not been unconstitutionally applied in this case and, as we have seen, it is not constitutionally objectionable on its face.

Even if this were not so, appellant's assertion that the scienter provision of § 484-h places an "impossible burden" on the small store operator is surely mistaken (*People* v. *Tannenbaum*, 18 N.Y. 2d at page 274). In the instant case, defendant-appellant did not even bother to ask the purchaser's age although he might easily have done so. Indeed all a seller need do when he is selling to a young person is to inquire as to his age and take a look at the magazine purchased before taking his money. In this case and in all other cases involving the "girlie" type of magazine, a mere glance at the cover would tell the seller to go no further with the sale. Certainly the small effort of inspection required may be justified in terms of the overridingly important objective served by such requirement: the pro-

tection of the young (*Bookcase Inc.* v. *Broderick*, 49 Misc. 2d 355, 357, aff'd 18 N.Y. 2d 71). Indeed, far greater efforts have been demanded of business enterprises by regulatory statutes in the service of less urgent social purposes.

That § 484-h has not had a restrictive effect on the distribution of printed matter is proved by the facts of this case set forth in the trial record and in appellant's brief in the Court below.

Despite the warning given defendant by complainant's mother, he continued to sell magazines freely and with no attempt at supervising or checking the sales to young people as evidenced by his sales to Richard Corey. Appellant's claim in substance that § 484-h would have a general restrictive effect in future cases does not present a claim ripe for adjudication by this Court (*Communist Party of America* v. *Subversive Activities Control Board*, 367 U.S. 1, Justice Frankfurter's majority opinion).

Moreover, the notion that a small store operator is utterly ignorant of the nature of the magazines he sells and totally incapable of informing himself on them is naive and unrealistic. Actually most store operators are familiar with the nature of most of the magazines they offer for sale. Those operators who do not have such knowledge can easily gain it by spending a few hours familiarizing themselves with the printed products they offer. If such effort is demanded of them, it is clear that they will undertake it rather than refrain from selling the magazines in question, since the effort involved in familiarization would be relatively small and the alternative policy of withholding sale would result in loss of income and profits.

The fact is the small store operator would *not* really be burdened unduly even by a strict liability statute (*People* v. *Tannenbaum*, 18 N.Y. 2d 268, 274).

The only type of proprietor who would really be imposed upon by a strict liability provision is the wholesale

or retail book dealer who may stock thousands of volumes whose nature is not revealed by book cover or title. The magazines sold by the small store operator almost always reveal their nature from their covers. In the few cases where this is not so, a mere rifling through the pages will reveal nude photos and the like or other indicia of contents and suggest the advisability or inadvisability of sales to children.

The attempt to nullify New York's statutory program for the protection of the health and morals of the young by resort to specious arguments and fanciful forecasts of restrictions on freedom of the press which have no basis in fact should not be approved by this Court (see *Bookcase Inc.* v. *Broderick,* 49 Misc. 2d 355, 357, aff'd 18 N.Y. 2d 71). It would be equally unfortunate if the rule of *Smith* v. *California* was misunderstood or was extended to a legal context where it has no relevance.

The indirect suppression doctrine of *Smith* v. *California* has no practical force if it is invoked in an attempt to show that the scienter provision of § 484-h will, in fact, significantly restrict access of the *adult* public to protected material. Since most adults are patently over the statutory age limit, the seller will not be stimulated to abstain from sales of other material to *adults* out of fear that they might be unsuitable for *children.*

In the infrequent cases where there is doubt as to the age of the purchaser, a simple inquiry or quick glance at the publication (see *People* v. *Tannenbaum,* 18 N.Y. 2d 268, 274) will enable decision as to whether or not to sell. Also, the statute recognizes the defense of honest mistake with respect to the seller's determination of age.

The rule of *Smith* v. *California* necessitates proof of scienter or knowledge only as to the *nature* of the publication sold and not as to the age of the purchaser (*age* was not an issue in the case). *Smith* v. *California* only holds that

the lack of any requirement whatsoever in a so-called adult obscenity ordinance of proof of knowledge of the nature of a publication comprehended within the terms of the act would tend to restrict indirectly the flow to adults of protected material.

The case does not hold that the failure of a prohibitory law to condition criminal liability on proof of the seller's knowledge of the purchaser's age is constitutionally objectionable as indirectly restricting access to protected material.

This Appeal Raises Substantial Federal Questions

Appellee respectfully submits that the judgments of conviction should be affirmed but must, in good conscience, concede that this appeal raises the following substantial Federal questions:

(1) This Court has sanctioned the doctrine of variable obscenity as related to sexually marginal groups such as sado-masochists in the *Mishkin* case, but it has never passed on the question of whether a state may predicate criminality on the sale or distribution to adolescents of literary and pictorial materials not obscene by the constitutional standards applicable in sales or distribution to adults. It is true that the Court has suggested the constitutional legitimacy of such "minors" laws in *Jacobellis* v. *Ohio* (378 U.S. 184) but the relevant statement in *Jacobellis* was mere dictum.

(2) This Court has not yet given decisional expression to the minimum constitutional requirements of such a "minors" statute and to what extent the criteria of obscenity enunciated in *Roth* and succeeding cases in this Court may be relaxed or modified in "minors" legislation without giving constitutional offense.

(3) This appeal also presents the issue of indirect restraint of freedom of the press and raises the question of

whether the doctrine of *Smith* v. *California, supra,* which involved a book dealer with no demonstrated knowledge or notice of the nature or contents of the books possessed and sold, should be extended to a candy store-luncheonette proprietor selling magazines in circumstances where, unlike *Smith,* the seller had some notice of the nature of the magazines sold.

The appellee feels that it has made effective answer to these claims here and in the courts below but it concedes that the Federal questions involved are of sufficient moment not only to invoke this Court's jurisdiction but to warrant extended consideration.

It might be argued with reason that if the Court should sustain the New York statute in an opinion disclosing the grounds of its decision, other states will have the authoritative guidance that they await and will be instructed in the constitutionally acceptable means of protecting the welfare of the young. Thus needlessly restrictive legislation will be avoided.

In view of these overriding circumstances of public policy and the values of free expression at stake, the appellee concedes that this is a case which may properly engage the extended attention of this Court.

CONCLUSION

The judgments of conviction should be affirmed.

March 22, 1967.

Respectfully submitted,

WILLIAM CAHN,
District Attorney, Nassau County,
County Court House,
Mineola, New York.

GEORGE DANZIG LEVINE,
Assistant District Attorney,
of Counsel.

FILED
OCT 13 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967

No. 47

SAM GINSBERG,

Appellant,

vs.

THE STATE OF NEW YORK,

Appellee.

On Appeal from the Appellate Term of the Supreme Court of the State of New York, Second Judicial Department

BRIEF *AMICUS CURIAE* OF THE COUNCIL FOR PERIODICAL DISTRIBUTORS ASSOCIATIONS, INC.

MORRIS B. ABRAM
JAY GREENFIELD
Attorneys for Council for Periodical Distributors Associations, Inc., Amicus Curiae
575 Madison Avenue
New York, New York 10022

Of Counsel:
JOHN E. LEMOULT
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON

TABLE OF CONTENTS

	PAGE
INTEREST OF THE *Amicus Curiae*	2
THE PURPOSE OF THIS BRIEF	2
POINT I—Section 484-h is unconstitutionally vague	4
POINT II—Section 484-h is unconstitutional because it defines "harmful to minors" in terms of adult conceptions of "suitability"	7
POINT III—Section 484-h is unconstitutional because it makes it a crime to sell non-obscene literature	10
POINT IV—Section 484-h is unconstitutional because it does not require scienter	13
POINT V—Even if all arguments made on appellant's behalf are rejected, the judgment cannot be affirmed unless this Court considers the contents of the publications sold	15
CONCLUSION	16

TABLE OF AUTHORITIES

PAGE

Cases:

Austin v. Kentucky, 386 U. S. 767 (1967) 16

Burstyn, Joseph, Inc. v. Wilson, 343 U. S. 495 (1952) 6
Butler v. Michigan, 352 U. S. 380 (1957) 12

Freedman v. Maryland, 380 U. S. 51 (1965) 12

Gault, Matter of, 387 U. S. 1 (1967) 7, 16
Gent v. Arkansas, 386 U. S. 767 (1967) 16

Jacobellis v. Ohio, 378 U. S. 184 (1964) 16

Kingsley Books, Inc. v. Brown, 354 U. S. 436 (1957) 12

Memoirs v. Massachusetts, 383 U. S. 413 (1966) 4, 8
Mishkin v. New York, 383 U. S. 502 (1966) 15

Paramount Film Distributing Corp. v. City of Chicago, 172 F. Supp. 69 (N.D. Ill. 1959) 3

Redrup v. New York, 386 U. S. 767 (1967) 16
Roth v. United States, 354 U. S. 476 (1957) 4

Smith v. California, 361 U. S. 147 (1959) 3, 15

Other Authorities:

Comment, *Exclusion of Children from Violent Movies*, 67 Col. L. Rev. 1149, 1158 (1967) 8
Lockhart & McClure, *Censorship of Obscenity: The Developing Consitutional Standards*, 45 Minn. L. Rev. 5, 86 (1960) 14
Comment, *More Ado About Dirty Books*, 75 Yale L. J. 1364, 1401 (1966) 14
New York Penal Law:
Section 484-h ..... *passim*
United States Constitution:
First Amendment 2, 7, 10, 12, 14, 16
Fourteenth Amendment 2

IN THE

Supreme Court of the United States

October Term, 1967

No. 47

SAM GINSBERG,

Appellant,

vs.

THE STATE OF NEW YORK,

Appellee.

On Appeal from the Appellate Term of the Supreme Court of the State of New York, Second Judicial Department

BRIEF *AMICUS CURIAE* OF THE COUNCIL FOR PERIODICAL DISTRIBUTORS ASSOCIATIONS, INC.

This brief *amicus curiae* is submitted on behalf of the Council for Periodical Distributors Associations, Inc. ("CPDA"), with the consent of all parties to the action, in support of appellant.

Interest of the *Amicus Curiae*

CPDA is a national trade association of more than 700 independent wholesalers of magazines and paperback books. The majority of magazines and paperback books sold in retail outlets throughout the nation are distributed by CPDA members. These include all of the well known names in periodical literature, such as *Time, Life, Look, TV Guide,* etc., and all of the leading lines of paperback books, such as Bantam, Pocket Books, Dell and Signet.

The members of CPDA are vitally interested in the outcome of this appeal because §484-h of the New York Penal Law, and comparable statutes in other states, which make it a crime to distribute to minors certain vaguely defined classes of non-obscene literature, will (a) deter the sale of constitutionally protected literature to adults, and (b) make it extremely difficult (and in some cases virtually impossible) for minors to purchase any work which refers to sex. This will obviously hurt the businesses of responsible wholesalers and retailers of publications. More important, it will erode First Amendment freedoms.

The Purpose of This Brief

It is our position that the First and Fourteenth Amendments prohibit *any* state interference with the distribution of non-obscene literature. If literature is not obscene, it is constitutionally protected, and if it is constitutionally protected, the proscriptions of the First and Fourteenth Amendments bar any state interference with its free dis-

semination. See *Paramount Film Distributing Corp.* v. *City of Chicago,* 172 F. Supp. 69 (N.D. Ill. 1959), where the Court discussed the constitutional and logical problems which arise whenever the legality of speech is made dependent upon the age of the audience.

Moreover, any statute which permits sales of particular books to a 17-year old, but prohibits sales of those same books to a 16-year old, is bound to be arbitrary and vague to the point of incomprehension. Given the differences which exist among minors and the necessary ambiguities in any rule which proscribes the distribution of certain literature, no rational and constitutional standard can be devised for defining the non-obscene literature which minors may not read.

However, we will not in this brief consider the question of whether it is constitutionally permissible to restrict the sale of non-obscene literature to minors. We are confident that this question will be adequately dealt with in appellant's brief. Instead, we shall demonstrate in this brief that even if some state regulation of the distribution of non-obscene literature to minors is constitutionally permissible, §484-h is, nevertheless, constitutionally defective (a) because it is simply incomprehensible, (b) because it makes the legality of a sale dependent, in part, upon a publication's so-called "suitability" for minors, (c) because it deals with the problem of minors' morals in the manner most likely to impede the constitutional rights of both adults and minors, and (d) because it would make meaningless the scienter requirements of *Smith* v. *California,* 361 U. S. 147 (1959).

POINT I

Section 484-h is unconstitutionally vague.

Section 484-h does not attempt to regulate obscenity. Neither the word "obscenity" nor the word "obscene" appears at any point in the statute. Instead, the statute makes it a crime to sell to minors (defined as persons under 17 years of age) any publication which is "harmful to minors." "Harmful to minors" is defined as

> "any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, when it:
>
> (i) predominantly appeals to the prurient, shameful or morbid interest of minors, and
>
> (ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and
>
> (iii) is utterly without redeeming social importance for minors."

This definition makes applicable to minors concepts which are derived, in large part, from opinions of this Court dealing with obscenity. *E.g., Roth* v. *United States,* 354 U. S. 476, 489 (1957); *Memoirs* v. *Massachusetts,* 383 U. S. 413, 418 (1966). It is an attempt to strip language from context in order to protect a criminal statute from constitutional attack. However, the attempt fails. The obscenity concepts which originated in *Roth* are designed for adults and obscene publications only. Stripped from the context for which they were designed, and applied to minors and "harmful" publications, the unavoidable vagueness of these

obscenity concepts is magnified to the point of incomprehension.

A brief consideration of the problems which a bookseller will face under §484-h illustrates the hopeless ambiguity.

Suppose, for example, that a wholesaler offers a retailer a non-obscene book on Greek mythology which contains photographs of classical statues, and relates some of the classical legends, without omitting the references to sexual behavior. Even if this bookseller had nothing else to do with his time, and even if he had the assistance of the most learned members of the bar, he could not possibly determine whether such a work appeals to the prurient, shameful or morbid interest of minors. How could he determine what interests of minors are appealed to by the Oedipus legend? His approach cannot be introspective because he is not a minor. Should he consider the interests of a mature 16-year old, an immature 15-year old, or a precocious 14-year old? Should he consider the interests of a minor in his town, in his county, in his state, or in the country as a whole? If he confers with psychologists and educators, he will come up with conflicting answers. The problems are insurmountable.

Similarly, the bookseller could not possibly determine whether the book is patently offensive to prevailing standards in the adult community as a whole with respect to what is "suitable" for minors. The opinions of this Court could be of no help because a new factor, "suitability," has been added to the judicial definition of obscenity.

Nothing less than a team of sociologists and psychologists could say what the "prevailing standards in the adult community" are concerning "suitable material for minors." Moreover, it is quite likely that such a team would conclude that "in the adult community as a whole" (whatever that may be), there simply are no "prevailing standards" on this question.

The bookseller would have comparable problems if he attempted to determine whether the mythology work had "redeeming social importance for minors." Is it socially important for the average 14-year old to be versed in Greek mythology? What about the exceptional 14-year old?

The inescapable conclusion is that no rational statutory definition can be formulated in terms of the interests of minors, "suitability" for minors, or social importance for minors. An adult bookseller could, perhaps, make sense out of comparable obscenity statutes which focus on adults, since he is bound to have greater knowledge of the adult mind, and since the definition of obscenity, as limited by decisions of this Court, applies only to a relatively small and fairly obvious class of materials. When, however, the necessarily vague obscenity concepts are employed in a "harmful to minors" statute, the bookseller can only throw up his hands. See *Joseph Burstyn, Inc.* v. *Wilson,* 343 U. S. 495, 504-05 (1952).

POINT II

Section 484-h is unconstitutional because it defines "harmful to minors" in terms of adult conceptions of "suitability."

Subsection (f)(ii) of §484-h defines "harmful to minors" in terms of patent offensiveness "to prevailing standards in the adult community as a whole with respect to what is *suitable* material for minors" (emphasis added). In addition to being unconstitutionally vague, this aspect of the definition seeks to make First Amendment rights dependent upon community consensus. Instead of the Constitution acting as a check upon the powers and prejudices of the majority, constitutional rights are to be limited by the opinions of the majority. This, we respectfully submit, is an attempt to nullify, by statute and public opinion, the restrictions which the Constitution imposes.

The First and Fourteenth Amendments apply to minors as well as to adults. See *Matter of Gault*, 387 U. S. 1 (1967). These amendments do not guarantee that all literature will be enlightening and edifying to minors; they say nothing about "suitability." Rather, these amendments guarantee freedom of speech. If they permit any restrictions on the dissemination of non-obscene literature (and we contend that they do not), they require, at a minimum, that the restrictions not be defined in terms of the opinions of some amorphous group concerning the "suitability" of the literature.

A parent can restrict what his child reads. However, if constitutional rights are to be independent of public

opinion, a minor's right to read may not be subordinated to unascertainable (and probably imaginary) prevailing adult standards concerning "suitability." The "suitability" standard can only serve to squelch free inquiry by the young and to entrench the opinions and prejudices of "the adult community as a whole." A recent comment in the Columbia Law Review points up the incompatibility between democracy and a "suitability" standard:

> "[T]oday's children are tomorrow's adults. Because a child will accept uncritically what he hears, he is to hear nothing but what the majority wants him to hear. Having heard, and by hypothesis accepted, nothing but orthodoxy all his life, he is to be suddenly transformed into a rational adult who will choose impartially in the marketplace of ideas. Surely this is too much to expect. Surely if we let any orthodoxy monopolize the minds of our children, we risk letting it control the future of our society. The first amendment, then, if its purpose is to preserve an authentic competition among opinions, must protect expression to children as well as to adults. It may be that children are so immature and unsophisticated that they can easily be led into confusion and error. But some risk of confusion and error is preferable to the risk of a deadening conformity of thought." (*Exclusion of Children from Violent Movies,* 67 Col. L. Rev. 1149, 1158 (1967) (footnote omitted).)

We recognize, of course, that certain members of this Court have subscribed to a definition of obscenity which requires, to some degree, a consideration of community standards concerning patent offensiveness. *Memoirs* v. *Massachusetts,* 383 U. S. 413, 418 (1966). However, there is a critical difference between (a) allowing the opinions of the adult community to determine, in part, what literature is forbid-

den to the entire community because it is patently offensive, and (b) allowing the opinions of the adult community to deny, to minors alone, access to certain literature which some adults find "unsuitable." When, in obscenity cases, the standards of the adult community are assessed in order to determine what is patently offensive to adults, the views of the most puritanical will be counterbalanced by the views of those who are more open-minded; this will prevent the extremist advocates of censorship from determining what literature must be unavailable to all. But, under §484-h, neither tolerant adults nor minors will act as an adequate check upon the prejudices of the most narrow-minded. The minors whose constitutional rights are to be defined have no voice in determining what is "suitable." The tolerant adults, on the other hand, are hardly likely to oppose restrictions on the rights of minors with the same vigor they would bring to bear in protecting their own constitutional freedoms.

Moreover, by concerning itself with "suitability," §484-h goes far beyond any definitions which have been formulated by this Court. The concept of "patent offensiveness," as previously employed by this Court, can be meaningfully applied in particular cases. The concept of "suitability," however, cannot; it is entirely unworkable, and is bound to impede freedom of speech and to foster conformity.

POINT III

Section 484-h is unconstitutional because it makes it a crime to sell non-obscene literature.

Any restriction upon the distribution of non-obscene literature which is "harmful to minors" is bound to make it more difficult for adults to obtain non-obscene literature and for children to obtain "harmless" literature. However, if this Court should decide that a state's interest in protecting minors from certain non-obscene literature justifies legislation, we respectfully submit that such legislation must be designed so as to afford this protection in a manner which will not needlessly impede the distribution of non-obscene literature to adults or of "harmless" literature to minors. (For the purposes of argument, we will make the unrealistic assumption that the term "harmful to minors" is not incomprehensibly vague.) As First Amendment freedoms are necessarily involved, any type of state legislation cannot do.

Criminal legislation, such as §484-h, will have the most inhibiting impact upon the distribution of non-obscene literature to adults and "harmless" literature to minors. If a busy luncheonette owner, such as appellant Ginsberg, can go to jail for selling a "harmful" book to a minor, the luncheonette owner may very well decide to sell no literature to minors or to refuse to sell anything which might possibly be found "harmful."

Under §484-h, only two types of booksellers will be willing to handle potentially "harmful" literature and to sell books to minors:

(a) those who are willing to run the risk of being prosecuted and condemned as criminals; or

(b) those who are willing to assume the burden of deciding whether particular publications may be "harmful to minors," and who are also willing to inquire into the ages of all young customers.

Given the realities of retailing, few, if any, booksellers will meet these criteria. Appellant Ginsberg, for example, does not appear to be the type of man who wishes to run the risk of criminal conviction and jail. Moreover, as the hard-working owner of a busy luncheonette, he has no time to decide whether a work on Greek mythology or *Playboy* (or anything else) may be "harmful to minors." Furthermore, as a businessman, he will not wish to offend his youthful customers by making them prove their ages, or by debating with them whether a particular publication is "harmful."

In all probability, if his conviction is upheld, appellant Ginsberg (and countless other booksellers) will have no choice except to refuse to sell books to minors or to refuse to handle any material which may be "harmful." Should this Court affirm, then, as a matter of reality, the category of possibly "harmful" literature will quickly encompass all pictures of nudes, anything which deals with sex, and anything deemed objectionable by any group of public or private censors.

It is certain, therefore, that if §484-h is held constitutional, there will be a serious interference with the constitutional rights of both adults and minors to read.

Non-criminal regulation of "harmful" literature can equally promote any legitimate state interest in protecting minors, and can do so without impeding First Amendment freedoms to the degree that criminal legislation will. For example, if a bookseller knows that he does not run the risk of jail unless the sale of a book to a minor has been enjoined or unless a court or an administrative body has, in a constitutional manner, declared the book "harmful," he will be less inclined to turn away minors or refuse to sell publications which might be "harmful." See *Kingsley Books, Inc.* v. *Brown,* 354 U. S. 436 (1957); *Freedman* v. *Maryland,* 380 U. S. 51 (1965). At the same time, well-drawn injunctive or administrative legislation could sufficiently restrain that same bookseller from selling "harmful" literature to minors.

In short, if civil, rather than criminal, legislation is utilized by the state, there will be a less serious interference with free speech, and minors will be equally protected.

This is not to suggest that this Court must tell a state legislature the means to use in carrying out its duties. However, when First Amendment freedoms are involved, this Court must insure that state legislation is "reasonably restricted to the evil with which it is said to deal"; it must insure that not even a part of the house is needlessly burned down in order to "roast the pig." *Butler* v. *Michigan,* 352 U.S. 380, 383 (1957). Since criminal legislation needlessly interferes with the distribution of non-obscene literature to minors, and since any legitimate state interest can be fully protected by non-criminal legislation, §484-h should be held incompatible with the First Amendment.

POINT IV

Section 484-h is unconstitutional because it does not require scienter.

Subsection (g) of §484-h imputes "knowledge" of "harmful" contents to any seller of a "harmful" publication who has

> "general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of both:
>
> "(i) the character and content of any material . . . which is reasonably susceptible of examination by the defendant, and
>
> "(ii) the age of the minor, provided however, that an honest mistake shall constitute an excuse from liability hereunder if the defendant made a reasonable bona fide attempt to ascertain the true age of such minor."

Because of its breadth and vagueness, this "knowledge" provision would permit the conviction of a bookseller who actually had no knowledge of a book's contents or of the "harmful" nature of those contents. This provision—and, in particular, the phrase "or a belief or ground for belief which warrants further inspection or inquiry"—would require a bookseller to either:

(a) run the risk of jail;

(b) refuse to sell publications to minors;

(c) refuse to handle publications which might have pictures of nudes or which might refer to sex; or

(d) familiarize himself with every publication he sells (i) which might have pictures of nudes, (ii) which might refer to sex, or (iii) which is claimed to be "harmful" by any public or private censor, and, in addition, require all youthful-looking customers to prove their ages.

Here, also, many (almost certainly, most) booksellers will choose one of the safe and economically realistic alternatives, and the First Amendment rights of both adults and minors will be significantly infringed.

Commentators have pointed up the constitutional infirmities of any statute which liberally imputes knowledge of obscene or "harmful" contents to a wholesaler or retailer of publications:

> "To insist that dealers in books and magazines determine at their peril which ones must not be sold to adolescents would be asking the impossible of them and therefore would probably violate the constitutional requirement of scienter."
>
> (Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards,* 45 Minn. L. Rev. 5, 86 (1960) (footnote omitted).)

> "[S]uch people [wholesale distributors and booksellers] cannot be expected to scrutinize the contents of everything they sell to determine its 'prurient appeal' or its 'patent offensiveness,' let alone its 'redeeming social importance.' "
>
> (Note, *More Ado About Dirty Books,* 75 Yale L.J. 1364, 1401 (1966).)

A statute which imputes knowledge of "harmful" contents whenever there is "ground for belief which warrants

further inspection" does not, in reality, require scienter at all. Instead, it compels economically unfeasible inspections, and creates an unrealistic fiction which subverts First Amendment freedoms. A bookseller prosecuted under §484-h faces the same dilemma which the bookseller defendant faced in *Smith* v. *California,* 361 U. S. 147 (1959); like the bookseller in *Smith,* appellant Ginsberg is being put under extreme pressure by the state to engage in rigorous self-censorship.

In *Mishkin* v. *New York,* 383 U. S. 502 (1966), this Court said (at 511):

> "The Constitution requires proof of scienter to avoid the hazard of self-censorship of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity."

Section 484-h is unconstitutional because its "knowledge" provisions require self-censorship, and do not, in the slightest, "compensate for the ambiguities inherent in the definition" of "harmful to minors."

POINT V

Even if all arguments made on appellant's behalf are rejected, the judgment cannot be affirmed unless this Court considers the contents of the publications sold.

We respectfully submit that, under all the circumstances, this Court should hold §484-h unconstitutional. We note, however, that even if it may be a crime to sell certain non-obscene literature to minors, and even if §484-h is constitutional, the conviction cannot be affirmed unless this Court further finds that the Constitution permits the states to restrict the sale to 16-year old males of the particular

publications sold by appellant. For, unless the First Amendment is inapplicable to minors, no conviction under §484-h can stand unless the publication and sale in question fall within the area of permissible state regulation. See *Matter of Gault*, 387 U. S. 1 (1967).

Accordingly, if this Court should reject the various arguments raised in support of appellant, we would ask it to determine, independently, whether, under any standard which might be deemed applicable, a bookseller has a constitutional right to sell the particular publications here involved to a 16-year old male. Ample precedents exist for such independent review of state court findings involving speech. *Redrup* v. *New York, Austin* v. *Kentucky* and *Gent* v. *Arkansas*, 386 U. S. 767 (1967); *Jacobellis* v. *Ohio*, 378 U. S. 184 (1964).

Conclusion

New York Penal Law §484-h should be held unconstitutional, and the judgment should be reversed.

Dated: October 11, 1967.

Respectfully submitted,

MORRIS B. ABRAM
JAY GREENFIELD
Attorneys for Council for Periodical Distributors Associations, Inc., Amicus Curiae
575 Madison Avenue
New York, New York 10022

Of Counsel:
JOHN E. LEMOULT
PAUL, WEISS, RIFKIND, WHARTON & GARRISON

SUPREME COURT, U. S.

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No. 47

IN THE

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OCTOBER TERM, 1967

SAM GINSBERG,

Appellant,

against

THE STATE OF NEW YORK,

Appellee.

ON APPEAL TO THE APPELLATE TERM OF THE SUPREME COURT OF THE STATE OF NEW YORK SECOND JUDICIAL DEPARTMENT

BRIEF FOR THE APPELLANT

EMANUEL REDFIELD,
Counsel for Appellant,
Office & P. O. Address,
37 Wall Street,
New York, New York 10005.

On the Brief:

EMANUEL REDFIELD,
WILLIAM K. FRIEDMAN,
BENJAMIN E. WINSTON.

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	1
Statute Involved	3
Questions Presented	3
Statement	3
The Charge	4
The Evidence	4
Summary of Argument	6
Books Are Distinguishable From Motion Pictures	9
ARGUMENT:	
I—The statute is an unconstitutional restraint on expression	9
Difference between Legislation as to Liquor and Cigarettes and Legislation as to Literature	18
The Operation of the Statute Restrains Distribution of Literature	18
Burden of Proof	23
II—The statute is vague and uncertain	24
Conclusion	27
Appendix A	28
The Statute	28

CITATIONS

Cases: PAGE

Adams v. Hinkle, 51 Wash. 2d 763, 322 P. 2d 84 (1958) 16

Bantam Books Inc. v. Sullivan, 372 U. S. 58, 70 23

Boyd v. United States, 116 U. S. 616, 635 14

Butler v. Michigan, 352 U. S. 380 19

Cole v. Arkansas, 333 U. S. 196, 198 6

Dennis v. United States, 341 U. S. 494, 505-508 16

Dombrowski v. Pfister, 380 U. S. 479 27

Freedman v. Maryland, 380 U. S. 51 ..... 9, 23

Gate Film Club v. Pesee, 379 U. S. 846 9

Gent v. Arkansas (sub Redrup v. New York), U. S. , 18 L. ed. 2d 515 ..... 11, 20, 25

In the Matter of Galt, ——— U. S. ——, 18 L. Ed. 2d 527 7

In Re Louisiana News Co., 187 F. Supp. 241 (1960) .. 16

Interstate Circuit, Inc. v. City of Dallas, No. 56, October Term 1967 9

Jacobellis v. Ohio, 378 U. S. 184 ..... 23, 25

Katzev v. County of Los Angeles, 52 Cal. 2d 360, 341 P. 2d 310 16

Kingsley International Pictures Corp. v. Regents, 360 U. S. 684 ..... 11, 13

Lovell v. Griffin, 303 U. S. 444 10

Manual Enterprises v. Day, 370 U. S. 478 21

Meyer v. Nebraska, 262 U. S. 390 15

Mishkin v. New York, 383 U. S. 502 21

PAGE

Paramount Film Distributing Corp. v. City of Chicago, 172 F. Supp. 69 22

People v. McCarthy, 250 N. Y. 358 6

People v. Tanenbaum, 18 N. Y. 2d 268 2

People v. The Bookcase, Inc., 40 Misc. 2d 796, 798 ... 10

Pierce v. Society of Sisters of Holy Name, 268 U. S. 510 15

Police Commissioner of Baltimore v. Siegel Enterprises, Inc., 233 Md. 110, 162 A. 2d 727 (1960) .. 16

Prince v. Massachusetts, 321 U. S. 158 15

Regina v. Hicklin (1868), LR 3 QB 306 .....20, 21

Roth v. United States, 354 U. S. 476 .....11, 21

Smith v. California, 361 U. S. 147, 152, 162 8

Stromberg v. California, 283 U. S. 359, 368 27

The Bookcase Inc. v. Broderick, 18 N. Y. 2d 71 2

The Bookcase Inc. v. Broderick, 385 U. S. 13, 17 L. ed. 2d 11 23

Times Film Corp. v. City of Chicago, 365 U. S. 495 .. 9

United Artists Corporation v. City of Dallas, No. 46, October Term 1967 9

United States v. Dennett, 39 F. 2d 564, 2nd Cir. 23

United States v. 31 Photographs, 156 F. Supp. 350 .. 21

United States v. Roth, 237 F. 2d 296 23

William Goldman Theatres, Inc. v. Dana, 405 Pa. 83, 173 A. 2d 59 16

Statutes: PAGE

Code of Criminal Procedure, Section 520 2

Model Penal Code, sect. 207.10(2) (Tent. Draft No. 6, 1957) 20

Penal Law:
Section 235 20
Section 484-f 16
Section 484-h 2, 3, 10

28 U.S.C., Section 1257(2) 2

Other Authorities:

"Comment—Exclusion of Children from Violent Movies", 67 Columbia Law Review 1148 17

S. Glueck and E. Glueck:
"Delinquency in the Making", pages 95-117, 194-199 24
"Predicting Delinquency and Crime", pages 245-255 24
"Family Environment and Delinquency", page 191 24

Kinsey report, Gebhard, Gagnon, Pomeroy & Christenson, "Sex Offenders", page 678, Institute for Sex Research (Kinsey Institute, 1965) 24

Kronhausen, "Pornography and the Law" 23

10 Law and Contemporary Problems, 721, 731 15

Lockhart and McClure, "Censorship and Obscenity: The Developing Constitutional Standards", 45 Minn. 5, 86 18

PAGE

Monaghan, "Obscenity, 1966: The Marriage of Obscenity Per Se and Obscenity Per Quod", 76 Yale Law Journal 127 24

Note, "More Ado About Dirty Books", 75 Yale Law Journal, 1364 17

President's Commission on Law Enforcement and the Administration of Justice, "The Challenge of Crime in a Free Society", pages 55-90 (1967) .. 24

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BRIEF FOR THE APPELLANT

Opinions Below

The Appellate Term did not write an opinion (although it did certify that the constitutional questions involved were raised and passed upon by it as will hereafter appear). The trial court did not write an opinion, although it did express itself at length at the trial (R. 247, 248-250, 253).

Jurisdiction

(i) This case arises from judgments of the District Court of the County of Nassau, First District, dated May 17, 1966 which convicted the appellant of having violated

Section 484-h of the Penal Law of the State of New York by selling four magazines to a person under 17 years of age. He was charged in each of two separate informations of having sold two of the magazines to the same minor. After an extensive trial the appellant was found guilty of the charges, and his sentence was suspended. He appealed from the judgments of conviction to the Appellate Term of the Supreme Court of the State of New York, Second Judicial Department, which affirmed the convictions by its judgment dated and entered January 20, 1967 (R. 259). That court by its order dated January 30, 1967 amended its judgment to certify that the federal questions here presented were presented to that court and necessarily passed upon (R. 260).

Application was made on January 24, 1967, as provided by Section 520 of the Code of Criminal Procedure of New York, to a judge of the Court of Appeals of the State of New York, for permission to that Court from the Appellate Term. Such permission was refused on the ground that no question of law was involved which should be reviewed. That Court, a few months previously had passed upon the federal constitutional validity of the statute in *The Bookcase Inc.* v. *Broderick,* 18 N. Y. 2d 71 (July 7, 1966) and *People* v. *Tanenbaum,* 18 N. Y. 2d 268 (September 29, 1966). These were urged and considered upon the application. A copy of the certificate of Judge Scileppi dated January 24, 1967, showing his denial of the timely application is in the Transcript of the Record (p. 261).

(ii) The judgment of affirmance appealed from was made and entered on January 20, 1967 (R. 259).

The Notice of Appeal was filed in the office of the Clerk of the District Court of Nassau, First District, the court possessed of the record, on January 24, 1967 (R. 262).

(iii) Jurisdiction of this appeal is conferred on this court by 28 U.S.C., Section 1257(2).

(iv) This court noted probable jurisdiction on June 12, 1967 (R. 264).

Statute Involved

The statute involved is Section 484-h of the Penal Law of the State of New York (Volume 39 McKinney's Consolidated Laws of New York Annotated; Laws of 1965, Chapter 327) which is set forth herein as Appendix A.

Questions Presented

1. Is Section 484-h of the Penal Law repugnant to the First and Fourteenth Amendments to the Constitution of the United States because it restrains expression?

2. Is Section 484-h of the Penal Law repugnant to the Constitution of the United States in that it denies due process of law by the vagueness and uncertainty of its provisions?

3. Considering the aforesaid objections to the statute should not the judgments of conviction of the appellant have been reversed and the informations dismissed?

Statement

The prosecution was commenced by an information which charged that on October 18, 1965 in Bellemore, New York, Ginsberg, in violation of Section 484-h of the Penal Law sold two magazines, "Mr. Annual" issue of "Fall 1965" and "Sir" issue of December 1965, to Richard Lance Corey, 16 years of age, and that the magazines contained pictures of persons and portions of the human body which depict nudity and which as a whole are harmful to minors.

Another information alleged that on October 26, 1965, the appellant at the same place sold to the same minor two magazines, "Man to Man" issue of January, 1966, and "Escapade" issue of December, 1965, and which contained pictures of persons and portions of the human body which depict nudity, and which taken as a whole is harmful to minors.

The Charge

The sole charge in each information is that in violation of the statute he sold magazines depicting nudity (R. 2, 4).

The Evidence

The appellant on the dates in question operated and still operates, a stationery, candy and luncheonette store called "Sam's Luncheonette" at 1507 Bellemore Avenue, Bellemore, New York (R. 63). He sold magazines, newspapers, cigars and lunch and "everything else" (R. 40, 89). He and his wife conducted the business which had to close down so that both could attend the trial (R. 157). The store is about 30 feet deep and 7 feet wide (R. 73).

On October 18, 1965, the minor, whose mother testified he was 16 years of age, entered and purchased "Sir" and "Mr. Annual", for which he said he paid Ginsberg, holding the magazines out flat and while Ginsberg was busy at the lunch counter (R. 20, 70). The purchase was made at the instigation of the parents of the boy for the purpose of laying grounds for prosecuting Ginsberg (R. 31, 32, 35). There was evidence by the appellee that prior to October 18, 1965, the mother of the boy visited the store and scolded aloud in the presence of appellant that magazines of the character of the ones in this case were being sold to her son of 15 years of age (R. 65, 68, 74). Appellee also presented evidence that the minor had a conversation with appellant in his store about October 12, 1965, in which he had advised Ginsberg to put the rack of

magazines behind the counter so he wouldn't "get in trouble with the law" and that he had told Ginsberg that he was 16 years of age (R. 65-66).

The purchase of the two magazines "Man to Man" and "Escapade" was made on October 26, 1965, at the instigation of a police officer (R. 33-37). At that time the appellant was behind the counter busy with servicing cigarettes and coffee (R. 164). He is usually so busy in the store that he cannot possibly observe all activities (R. 198, 199).

The uncontradicted testimony, among others, of Ginsberg, was that he operates the store with his wife (R. 157, 197). He buys these magazines from G.N.S. News, a distributor, from whom he has no choice as to the magazines —they are all lumped together with other publications sent to him twice a week automatically, without being ordered by him (R. 157-161). He carries about 200 titles of magazines in his store (R. 157, 189).

The prosecution came on for trial on April 18, 1966 before District Court Judge Julius Chinman, without a jury. After a trial he adjudged the appellant guilty on all charges on May 17, 1966 and suspended sentence (R. 247, 254). He made the following findings (R. 248-249):

1. That Richard Corey on October 18, 1965 and October 26, 1965 was 16 years of age.

2. The defendant knew or had reason to know that Richard Corey was under 17 years of age.

3. All the magazines in question contained pictures of nudes.

4. "Escapade" and "Mr. Annual" contained verbal descriptions and narrative accounts of sexual excitement and sexual conduct.

5. The material is harmful to minors in that the photographs and accounts appeal to the *prurient, shameful and morbid interest* of minors (emphasis supplied).

6. Considering the adult community as a whole, the material is wholly unsuitable for minors under 17 years of age.

7. That a monetary consideration was paid for the purchase by Richard Corey of the magazines from the defendant.

8. The defendant knew the contents and character of the magazines.

Findings 4 and 5, that the magazines contained "verbal descriptions" and "accounts", are immaterial, as the informations only alleged that the magazines contained nude pictures. In the context of this case, it is the charge alone that controls, *Cole* v. *Arkansas*, 333 U. S. 196, 198.

The appellant appealed from the judgments to the Appellate Term of the Supreme Court of the State of New York, Second Judicial Department. That court, on January 20, 1967, affirmed the judgments.

Appellant applied to a judge of the Court of Appeals of New York for leave to appeal to that court, but permission was refused. Appellant thus exhausted all state remedies open to him (*People* v. *McCarthy*, 250 N. Y. 358).

The Appellate Term by its order certified that appellant raised in that court and that court necessarily passed upon the federal questions presented in this appeal (R. 260).

Summary of Argument

1. Although other issues are raised in this case, the uncertainties created by this statute to the book distributing and selling trade make this case ripe for a decision of the

question whether a statute, even a most specific one, may restrain distribution to a person because of his age. It is to be hoped that the court will rule on this point, even if appellant may prevail on the other points. The statute is a prior restraint on the distribution of literature. A heavy burden rests on one who seeks to justify restraints against the press. Although utterances have been made that such restraints may be valid, no authority for such statutes exists. On the contrary, the Constitution speaks against infringements of the right of expression. Statutes against obscenity have been sanctioned because of a supposed historical genesis. But support for the legislation against non-obscene literature cannot be found in the text of the Constitution, in its gloss or antecedents. Since this court has condemned any restraints other than those for obscenity based on the prurient appeal of the literature to the average person, the statute in question falls within the condemnation. In addition, a practical reason renders this statute a restraint on expression: the burden placed on a bookseller, especially a busy one like Ginsberg, who periodically receives new titles and stocks 200 different ones, sells stationery, cigarettes, candy, lunch, and other similar products, to ascertain whether the literature meets statutory clearance and also ascertain at his peril, the age of the purchaser, intimidates the vendor to the point where he would be discouraged from distributing publications to anyone.

The appellant's position is that the restriction on the distribution of literature based on age classification is censorship, pure and simple. It thus is an infringement of the Constitution.* If it is sought to justify the censorship by a weighing and balancing of advantages the answer is twofold: (1) The Constitution does not permit a balancing. But absent obscenity there is no legal basis for balancing. The Constitution does not countenance censorship of books on evolution because in balancing values, it might

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* Cf. *In the Matter of Galt*, —— *U. S.* ——, 18 L. Ed. 2d 527.

be concluded that such literature would be harmful to certain religious beliefs; (2) if balancing were warranted, the harm done to booksellers and to adult reading far outweighs the doubtful harm done by such literature.

This impractical law should not be a device to intimidate booksellers. This law is impractical because there is little that would prevent a book bought by a person over 17 from reaching a younger person. If a boy of 17 brought a book home, what would prevent it from falling into the hands of a younger brother of under 17? Thus, the objective of the law in attempting to prevent those books from reaching the classified age will be futile. In the scale of values is it desirable that booksellers should be harassed and intimidated in pursuit of a futility? Should booksellers become embroiled in the turbulence of ascertaining ages in the interest of a law that will produce nothing but intimidation of them? *Smith* v. *California,* 361 U. S. 147, 152, 162, teaches us that the freedom of expression has a preferred protection under the Constitution and no interference with the dissemination of literature will be acceptable.

2. The statute is vague in that it does not provide standards by which a bookseller could clearly know what conduct is forbidden and which is permitted. The key to the control of dissemination to persons under 17 is whether the literature is "harmful to minors". The phrase, as well as the statutory attempts to define it make the statute beyond comprehension to a lawyer, not to mention, the owner of a luncheonette.

3. The magazines in question are not obscene by this court's own decisions. The only *charge* against Ginsberg is that they contain nudes, in that the female breast is fully exposed. The trial court held that this alone fulfilled all the elements of the crime. We urge that the magazines are not harmful to minors within the tests set forth in the statute.

Books Are Distinguishable From Motion Pictures

We also suggest that the case of literature stands on a different footing from motion pictures.* This court in *Times Film Corp.* v. *City of Chicago,* 365 U. S. 495, held that motion pictures are an exception in that prior restraint as to them may prevail. Although the writer sought in *Gate Film Club* v. *Pesce,* 379 U. S. 846, to have this court put films on the same footing with books and magazines, the court rejected that contention. It also confirmed its *Times Film* doctrine in *Freedman* v. *Maryland,* 380 U. S. 51.

Since the realities of the situation must be accepted, it is clear that books and magazines are freed from prior restraint, but motion pictures are not. This provides a greater scope for appellant's claims. Secondly, since one of appellant's contentions rests on the pragmatic ground that the policing required of the bookseller with its concomitant perils to him, would discourage sales to all persons, a distinction appears in the media of communication. With respect to books, we also urge that the attainment of the ends sought by this statute, to keep certain literature away from minors is illusory because a book can readily be transferred (without a commercial motive) from a child over 17 to one under 17.

ARGUMENT

I

The statute is an unconstitutional restraint on expression.

Appellant claims that the statute is repugnant to the Constitution of the United States, First and Fourteenth

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* The case of *Interstate Circuit, Inc.* v. *City of Dallas,* No. 56, October Term 1967 and *United Artists Corporation* v. *City of Dallas,* No. 46, October Term 1967, have been set for joint argument with *Ginsberg.*

Amendments thereof, in that the statute restrains the distribution of literature. This court has held that distribution of publications is a constitutionally protected right (*Lovell* v. *Griffin*, 303 U. S. 444).

Appellant was prosecuted because in violation of the statute, he distributed certain magazines to a person under 17 years of age. It is not urged by the State that the literature is obscene. Nor does the statute speak against obscene literature. Under a prior statute which was held invalid for vagueness, a New York court said: "If it were to be held that Section 484-h is coextensive with Section 1141 (the obscenity statute), then it is entirely superfluous . . ." *People* v. *The Bookcase, Inc.*, 40 Misc. 2d 796, 798.

The statute prohibits the sale to persons under 17 years of age of pictures of nudity* or sexual conduct, which is "harmful to minors" or literature containing such pictures or narrative accounts of sexual excitement which as a whole is "harmful to minors".

"Harmful to minors" is defined as follows:

"Harmful to minors" means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, when it:

(i) predominantly appeals to the prurient, shameful or morbid interest of minors, and

(ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and

(iii) is utterly without redeeming social importance for minors.

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* The appellant was charged solely with distributing literature and pictures of nudity.

It is thus clear that the statute does not purport to make unlawful distribution literature which is obscene within the definition of *Roth* v. *United States,* 354 U. S. 476. Under the statute, if a book or magazine contains "nudity" even so much as the showing of a female breast "with less than a fully opaque covering of any portion thereof below the top of the nipple" (subd. 1(b)), then the sale or loan comes within the terms of the statute and the vendor becomes subject to a prison term of one year.

The magazines in question are of the type this court held were not obscene in *Gent* v. *Arkansas (sub Redrup* v. *New York),* U. S. , 18 L. ed. 2d 515; "Sir" was one of the titles in that case.

Therefore, the question arises, by what authority may a legislature enact such interferences with the distribution of literature? Certainly, nothing is found in the text of the Constitution. The Constitution, contrariwise, by its text prohibits all laws "abridging the freedom of speech, or of the press". Indeed, the decision in *Roth* rests on a presumed historical background of permitted suppression before the adoption of the Constitution, although such a history can be countered with the argument that the adoption of the First Amendment was for the very purpose of overturning any prior usage.

Whatever may be said in extracting some authority, contextually, for restraints against "obscenity" cannot be found for restraints against non-obscene literature. This court in holding that *Roth* was permissible as a small restraint, emphasized that it is only "obscene" literature that may be the subject of regulation. In *Roth* the criterion of forbidden literature was its impact on the "average" person. Conversely, this court subsequently held in *Kingsley International Pictures Corp.* v. *Regents,* 360 U. S. 684, that expression dealing with sex, but not obscene, is protected by the Constitution. In that case, a motion picture, "Lady Chatterley's Lover" was denied a motion picture license on a determination by the licensing

board that the motion picture violated the law which provided that the license shall be issued "unless such film or part thereof is obscene, indecent, immoral, inhuman, sacrilegious, or is of such a character that its exhibition would tend to corrupt morals or incite to crime . . ." By definition, "immoral" and "tend to corrupt morals" meant a film "the dominant purpose is erotic or pornographic: or which portrays acts of sexual immorality, perversion of lewdness, or which expressly or impliedly presents such as desirable, acceptable or proper patterns of behavior".

The licensing agency had found the picture to be immoral under the law because it had for its theme the presentation of adultery as desirable, acceptable and proper pattern of behavior.

This court held however that the picture was not obscene. It held further that since the First Amendment protects expression, the ruling below struck at "the very heart of constitutionally protected liberty".

Said the court (p. 688):

> "It is contended that the State's action was justified because the motion picture attractively portrays a relationship which is contrary to the moral standards, the religious precepts, and the moral code of its citizenry. This argument misconceives what it is that the Constitution protects. Its guarantee is not confined to the expression of ideas that are conventional or shared by a majority. It protects advocacy of the opinion that adultery may sometimes be proper, no less than advocacy of socialism or the single tax. And in the realm of ideas it protects expression which is eloquent no less than that which is unconvincing."

See also, *Smith* v. *California*, 360 U. S. 147, where this court said (152):

> "Our holding in *Roth* does not recognize any state

power to restrict the dissemination of books which are not obscene."

The pronouncements of this court are applicable here. Since the issue of obscenity is not involved here, the expressions of sex would be akin to those in the *Kingsley International* case.

The statute under attack would bar the distribution of the following books and authors to persons under 17:

Aristophanes—Lysistrata
Aeschylus—Oresteian Trilogy
Ovid-Metamorphoses
Boccaccio—The Decameron
Malory—Knights of the Round Table, Tristan and Isolde
Rabelais—Gargantua and Pantagruel
Chaucer—Canterbury Tales
Richardson—Pamela
Defoe—Moll Flanders
Fielding—Tom Jones
Shelly—Queen Mab
Hawthorne—Scarlet Letter
Stendahl—The Red and the Black
Gauthier—Mademoiselle De Maupin
Balzac—Droll Stories
Flaubert—Madam Bovary
Zola—Nana
Shaw—Mrs. Warren's Profession
Schnitzler—Hands Around
Dreiser—American Tragedy
Dreiser—Sister Carrie
Joyce—Ulysses
Lawrence, D. H.—Sons and Lovers
Hemingway—For Whom the Bell Tolls
Faulkner—The Sound and the Fury
O'Neill—Strange Interlude;
Desire Under the Elms;
Mourning Becomes Electra.

While it may be readily interjected that the foregoing may be of redeeming social importance, nevertheless, under subdivision 1(f)(ii) they may be held "patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors".

Since the expression of ideas is protected, it follows that it cannot be limited to any particular classified audience, since it may not be interfered with at all. Classification means censorship. Censorship, no matter how small or desirable, is still censorship; and once the barriers are breached, an insidious entering wedge is provided for more censorship. *Boyd* v. *United States,* 116 U. S. 616, 635, speaks out against the encroachment on liberty by stealth. True, it might be desirable for immature minds, whether 17 or 35, to have their literature evaluated for them. But evaluation is the censor's way. Since the Constitution, born out of a history that knew censorship, rejects censorship, it follows that the classification for under 17-year-olds must fall.

Censorship is not permissible because persons under 17 must have their minds developed under the aegis of the state. In other words, censorship is good for those under 17. It would thus follow that censorship is good for any age the legislature may find is desirable.* The gist of the argument is that censorship is good because it is good. But it does not satisfy the strictures of the Constitution against all censorship. The Constitution does not forbid

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* To approve censorship for those under 17 could lead to approval of censorship for those under 21 years. Since it is the legislature that fixes the age, there is no reason why 25 or 30 or more, could not be found by the legislature necessary to receive the dubious protection of the law. Thus censorship, finding a crack open, rushes in as it widens the crack.

To be consistent, it would logically follow that the legislature could proscribe distribution to anyone because it found a type of literature to be injurious to mental or emotional development. Even Andersen's *Fairy Tales* could not then escape condemnation, for it could be claimed that the book is inimical to a person's welfare in producing a world of fantasy instead of the world of reality so necessary for healthy and strong minds.

censorship because censorship may not be good for some readers. There are some well-intentioned persons who clamor for censorship because it would provide an official evaluator of literature. But history has disclosed the evils of censorship. The First Amendment is the monument to that history.

The state is not the omniscient guardian of the minds of persons, adults or children. For example, in *Meyer* v. *Nebraska,* 262 U. S. 390, a statute prohibited the teaching of a subject in the public and private schools in a language other than English. The statute was condemned by this court. Meyer had taught the German language. He had a right to teach it, the court held, so long as the parents of children wished him to instruct their children in that language.

Thus, the power of the state to punish the dissemination of literature to children was limited. Teachers could not teach a subject if parents did not choose to keep their children from acquisition of such knowledge.

Again, in *Pierce* v. *Society of Sisters of Holy Name,* 268 U. S. 510, a similar doctrine was etched. Oregon sought to ban private schools. But the Supreme Court held that the state's power could not be used to standardize its children by compelling them to attend public schools only. The court there said, "the child is not the mere creature of the state." See also, 10 Law and Contemporary Problems, 721, 731.

Therefore, drawing together the strings of our argument thus far, we must observe that it is easier to state that there can be a restraint on distribution to minors than to demonstrate the authority for such censorship.

Prince v. *Massachusetts,* 321 U. S. 158, does not support the statute. That case does not deal with a proscription of a selected class of literature. It has nothing to do with the content of the literature. It deals with a child labor situation, wherein the type of work a child may engage in is regulated. Because the state may regulate labor conditions for a child, it does not follow that it may control reading mate-

rial. No one could seriously contend that because the state may regulate the conditions of employment for *women*, a statute could regulate the kind of non-obscene literature an adult woman may read or have distributed to her.

And a further question remains, what authority is there for singling out literature dealing with sex. Since obscenity is not the criterion, justification of censorship for minors, because of their welfare, could likewise justify censorship of all other ideas a legislature may deem inimical to children, such as stories of violence and crime or the teachings of evolution. Once a legislature is permitted to censor because of its interest in the welfare of the reader, what will be its limits? That this is not a fanciful fear, see the legislation against "comic books" in New York, Section 484-f of the Penal Law.* All of which points to the observation that once the door to censorship is opened, even a little, attempts are made to widen the breach.

Does the Constitution yield when the distribution is made to a person under a certain age? If so, then the constitutional interdiction is rendered meaningless. If censorship is forbidden, how can it be approved because of the age of the reader? If the legislature may forbid certain literature to persons under a certain age, it would logically follow that the legislature may select the literature. It could then say that teaching theories of evolution to a person under 21 is unlawful, because of legislative opinion such learning may harm that person's development. To endow a legislature with power to choose the literature it would restrain (other than the permitted one of obscenity) is to make a shambles of the concept that censorship shall not exist. *Dennis* v. *United States*, 341 U. S. 494, 505-508.

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* See in this connection, *Adams* v. *Hinkle*, 51 Wash. 2d 763, 322 P. 2d 84 (1958). *Police Commissioner of Baltimore* v. *Siegel Enterprises, Inc.*, 233 Md. 110, 162 A. 2d 727 (1960); *Katzev* v. *County of Los Angeles*, 52 Cal. 2d 360, 341 P. 2d 310; *William Goldman Theatres, Inc.* v. *Dana*, 405 Pa. 83, 173 A. 2d 59; *In Re Louisiana News Co.*, 187 F. Supp. 241 (1960).

The subject divides itself into two criteria:

(1) the types of literature sought to be proscribed; and

(2) the capacity of the readership.

The necessary implications follow:

If a state may select for prohibition of certain literature because of the lack of capacity of a class of readers, it would follow that any type the legislature selects (assuming even supporting findings are made) would fall under the ban. For example, approval of this kind of censorship would mean that a state could enact legislation by which Mark Twain's "Tom Sawyer" and "Huckleberry Finn" could be banned as harmful to persons under 18 or 12 because they provide examples of school delinquency, superstition, bad manners, disrespect to elders, theft, irreverence and racism. This is not far-fetched, for it actually happened to those books. Likewise, "Peter Pan" could be ostracized for it could be shown by instances where children were tempted, in emulation, to fly out of windows, with consequent bodily injuries.

There would be no reason for confining such a regulation of readership to literature that is related to sex. Aside from the practical difficulty of trying to separate the all-pervasive sex theme, there cannot be any justification in principle or logic. If a book is a bad influence then it matters not what the nature of its principle theme is.

It therefore follows that, were censorship allowed as to sex-oriented literature, not obscene to the average person, based on reader capacity, then as a matter of principle censorship should be allowed as to any other literature a legislature may deem harmful. See, "Comment—Exclusion of Children from Violent Movies", 67 Columbia Law Review 1148; Note, "More Ado About Dirty Books", 75 Yale Law Journal, 1364.

Up to this point the types of literature subject to proscription have been considered. We now turn to the criterion of the capacity of the reader who is sought to be affected. The necessary implication of such a law is that the state regards it a right to intrude into the learning processes of a person. In this case, it is age that sets the standard of capacity.

There are many persons far above 17 years of age who need protection in their learning. One need not turn to "Don Quixote", of another age, to understand how an adult of 50 years was influenced by books on chivalry, resulting in anti-social behavior of assaulting persons and destroying property. The current mob spirit and the blandishments of advertising and propaganda serve to reveal that persons of all ages are affected and often badly influenced.

Difference between Legislation as to Liquor and Cigarettes and Legislation as to Literature

Justification for this type of legislation is sought by its proponents by analogy to the proscription against the sale of liquor and cigarettes to persons below a fixed age. But this court has made a solid distinction. In *Smith* v. *California,* 360 U. S. 147, it was emphasized that matters of the stomach are not in the same category with publications.

The Operation of the Statute Restrains Distribution of Literature

Pragmatic consequences also challenge the validity of the statute on the ground that such statute restrains the distribution of literature to persons not affected by the literature.* Lockhart and McClure, writing in "Censorship

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* This court in *Smith* v. *California, supra,* rested its decision on a pragmatic base. Because of the hardship and impossible burden placed on the bookseller, as we argue here, the court held that even a *malum prohibitum* that is ordinarily permissible, would have to give way when free distribution of literature is at stake.

and Obscenity: The Developing Constitutional Standards", 45 Minn. 5, 86, conclude: "For these reasons, we suspect that the Supreme Court might well invalidate statutes designed to deny a peripheral adolescent audience access to books and magazines aimed at a primary audience of sexually mature adults, because of the tendency to reduce adult reading material to a level suitable for adolescents". The operation of such a statute by its effect produces the result, says Lockhart and McClure, against which this court spoke in *Butler* v. *Michigan*, 352 U. S. 380. This effect would be produced by compelling booksellers to segregate such literature and guarding it against intrusion by adolescents. This advertisement against forbidden fruit could only result in attracting more adolescents. The policing problem would become an impossible burden, leading the bookseller to abandon sale even to adults. Thus, the adults would be deprived of such literature, because it was not available for distribution to adolescents. These thoughts, coming from the pen of the engineers of the so-called variable obscenity doctrine (about which more hereafter) are indeed impressive.

The statute is directed against booksellers. The burden on a bookseller to ascertain (a) the nature of the forbidden article and (b) the age of the purchaser, can lead only to timidity on the part of the bookseller, with consequent restraint upon distribution. The average bookseller, be he a newsdealer, stationery vendor or druggist, has little ability, not to mention time, to ascertain whether a given title among hundreds (200 in this case) in his store falls within the ban of the statute. Yet, he must be able to not only overcome the hurdle of whether books are obscene to the average person to avoid ordinary obscenity prosecutions, but must also make a judgment whether they are harmful to children by the complex statutory formulas that defy lucidity to even lawyers for their application. And if, after wading through the complexities of the statute (stopping in the midst of selling toothpaste or

making a sandwich for a customer, to consult the statute for its operation on the prospective book purchaser), he concludes that the statute applies, he then is met with the burden of guessing the age of the purchaser. And should he guess incorrectly, he is subject to a year's imprisonment.

How, under these circumstances, can a bookseller conduct his business? He would be better off not to sell any books if these burdens and hazards are to be his lot.

This court in *Smith* v. *California,* 360 U. S. 147, inveighed against any laws that create timidity in book distribution, for timidity impairs the free flow of ideas.

Against the appellant's arguments that this statute creates an inadmissible censorship, the principal reliance in support of this legislation is that a legislature may adopt a variable readership.

One feature of the variable readership proposal is that the material be designed for distribution to a susceptible audience. This requirement is probably intended to neutralize any opposition that a return to the *Hicklin* (*Regina* v. *Hicklin,* [1868] LR 3 QB 306) rule is in sight. In any event, the statute in this case does not explicitly speak against harmful literature which is designed for persons under 17.* Nor is the literature in this case of that kind: "Sir" was upheld by this court in *Gent* v. *Arkansas, supra,*

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* The revised New York Penal Law, in effect September 1, 1967, took precautions to make explicit the requirement of a design:

"§ 235

Obscenity . . .

Predominant appeal shall be judged with reference to ordinary adults unless it appears from the character of the material or the circumstances of its dissemination *to be designed for children or other specially susceptible audience.*" (emphasis supplied)

See also, Model Penal Code, sect. 207.10(2) (Tent. Draft No. 6, 1957) which requires that it be established that the subject matter was directed towards the "variable" group.

and the other three publications are of the same character. They clearly are not of the kind "directed" to the age class in the statute.

One need not be awed by the expression, "variable readership". The phrase is simply part of the legerdemain so frequent in the area of First Amendment protections, where the force of a principle compels a new word to be invented for those who seek to escape the logic of the principle. *Roth* v. *United States,* 354 U. S. 476, in abandoning the *Hicklin* doctrine, held that obscenity was not to be determined by its effect upon the audience, but only by its effect upon the average man. The creators of the expression "variable readership" are merely reviving the *Hicklin* doctrine under a new label. The error has crept into legal literature by a misinterpretation of *Manual Enterprises* v. *Day,* 370 U. S. 478 and *United States* v. *31 Photographs,* 156 F. Supp. 350. In those cases, exception from the force of the *Roth* case was allowed, because those publications had redeeming social value. It was not the audience in those cases that was the criterion of obscenity, as the "variable" protagonists urge. Rather, concededly obscene items were found to have a social use that warranted their circulation. But that is a far cry from the instant statutes which seek to proscribe that which is not obscene to the average person. Were "obscenity", as defined by *Roth,* in issue, there would be no need to create a new statute; resort could be had to the existing obscenity statute, Section 1141 Penal Law. *Mishkin* v. *New York,* 383 U. S. 502, is an example of the enormous problems that lie ahead, though that decision emphasizes that it rested on a *design* for a particular class.

It should be emphasized against the "variable" concept, that what is really wrong is to make age the factor. There are different developments within an age group, and moreover, there are so many variables not only within the same age group, but between age groups. In short, there are different children and different susceptibilities. The same

applies to adults. Once the box is opened for selectivity based on age, Pandora's problems leap out.

It should be observed that under the statute and as illustrated by the facts in this case fulfillment by the prosecution of the conditions can occur only by a meticulous prearranged plan to "entrap" the small busy stationery-luncheonette owner with the use of a minor as a decoy. The appalling consequences to the minor by employment for such shameful practices probably outweigh any possible benefit sought for minors. In this case, the purchase of the magazines was instigated on the first occasion by the parents of the boy and, by the police on the second occasion. In order to show knowledge of the contents of the material and knowledge of the age, the prosecution presented the testimony of the minor that he had told Ginsberg to keep the rack of magazines behind the counter lest he run afoul of the law. He also testified that he told Ginsberg that he was 16 years of age, although there was no occasion for such disclosure. The boy was coached how to purchase the magazine and to lay a foundation for the arrest of this hard-working and perfectly honorable appellant (R. 255).

Since it is inevitable under this complex statute that other prosecutions will require enlistment of children under 17 to act as decoys and conspirators against booksellers it is a reasonable conclusion that such activity will produce more damage to a child than any of the literature in question.

Thus, the appellant stands convicted under judgments (for which he could have been sent to prison for one year on each count) solely because he sold these nationally distributed magazines to a person below an age chosen by the legislature (see, *Paramount Film Distributing Corp.* v. *City of Chicago,* 172 F. Supp. 69, where the statute proscribing the exhibition of a motion picture to persons under

21 was held unconstitutional; and also, *United States* v. *Dennett,* 39 F. 2d 564, 2nd Cir.).

Although there was a statement in one of the opinions in *Jacobellis* v. *Ohio,* 378 U. S. 184, reflecting in general upon the validity of distribution to minors of material protected by the First Amendment, the statement did not form the basis of the court's decision. That case cannot be said to dispose of the question here presented. Nor was the question disposed of in *The Bookcase Inc.* v. *Broderick,* 385 U. S. 13, 17 L. ed. 2d 11, in which this court refused to review the appeal in that case.

This statute can only serve to harass booksellers. They cannot attain their objective of keeping an offensive book from reaching a child, for what is to prevent an older person from purchasing a book and passing it on to a younger one. While the court is not concerned with the wisdom of the law, it cannot fail to note the impact of the law on the bookseller.

Burden of Proof

The rule is that expression is to be free from restraints, and that he who would assert justification for a restraint has a heavy burden (*Freedman* v. *Maryland,* 380 U. S. 51) to overcome the heavy presumption against constitutional validity of such restraints, *Bantam Books Inc.* v. *Sullivan,* 372 U. S. 58, 70. It is not enough to excuse the necessity of restraint by the facile invocation of the welfare of children. Everyone is in favor of a child's advancement toward the good things life offers. But before a conclusion can be reached that the non-obscene literature sought to be condemned has a socially harmful effect, it is necessary that scientific proof be adduced that the means used serve the ends sought. None has been produced. In *United States* v. *Roth,* 237 F. 2d 296, Judge Frank, dissenting with a comprehensive study of the subject, said that children who get into trouble seldom read. Kronhausen, "Pornog-

raphy and the Law", a psychiatrists' study, showed that the reading of erotic literature has no harmful effect on adult or adolescent. See also new Kinsey report, Gebhard, Gagnon, Pomeroy & Christenson, "Sex Offenders", page 678, Institute for Sex Research (Kinsey Institute, 1965) to like effect.

Other researchers have shown that delinquency—anti-social behavior traits, comes from physical condition and home environment rather than from books and motion pictures. S. Glueck and E. Glueck, "Delinquency in the Making", pages 95-117, 194-199; S. Glueck and E. Glueck, "Predicting Delinquency and Crime", pages 245-255, where it is shown that anti-social habits form very early, before there is access to literature; S. Glueck and E. Glueck, "Family Environment and Delinquency", page 191, where it is demonstrated that attempts to deprive juveniles will not succeed, because their drive will seek an outlet. See also, President's Commission on Law Enforcement and the Administration of Justice, "The Challenge of Crime in a Free Society", pages 55-90 (1967); Monaghan, "Obscenity, 1966: The Marriage of Obscenity Per Se and Obscenity Per Quod", 76 Yale Law Journal 127, *passim*.

II

The statute is vague and uncertain.

The trial court found the material prurient, shameful and morbid (R. 249). It did this to satisfy the definition of "harmful to minors".

1. "Harmful to minors", as sought to be defined, overreaches itself: It is not limited to prurient appeal. It also proscribes literature that predominantly appeals to the "shameful" and "morbid" interest of minors.

This statute makes possible the convictions of a person because of a sale to a minor of pictures or magazines con-

taining pictures of nudes such as Goya's, "Maja", and Rembrandt's, "Bathsheba". If a court or jury should find that such nudes appeal to the prurient, shameful and morbid interest of minors, and without redeeming value to minors, judgment of guilt would follow. While the nudes in the magazines before the court are not in the same category of art as the paintings mentioned, the question is not a debate on which is greater art. As to the Goya and Rembrandt many adults may conclude, altho incorrectly, that as to minors, they are prurient, shameful and morbid and not suitable for children and without redeeming social value.

Once the door of the jail is open however slight by the power of the state, because of judgments as to what is "suitable material for minors" (sub. 1(f)(ii)), it is inevitable that the door will be opened wider and wider, for the vagueness of the statutes provides inherent expansion.

2. By the conjunctive statute, the People must also prove that the material is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable for minors. This could have some specificity if it stopped with "patently offensive to prevailing standards in the adult community". But even there it does not say which community. Is it Bellemore or the State of New York or the United States? When the statute adds, however, "with respect to what is suitable for minors" it makes the meaning contradictory or at least beyond interpretation. Does it mean that what offends children from an adult's point of view is condemned or does it mean that it is offensive to adults and therefore is to children? Does it mean that the judiciary is ousted from determining what is suitable?

3. The statute speaks of a sale made "knowingly" which includes "reason to know" or "belief which warrants further inspection". We submit that these phrases

cannot put a vendor on notice as to what he must do or refrain from doing. The proof must be that the vendor knew the character and content of the material. This is not clear as to whether or not character means that he knew the material was of the kind the statute forbids.

4. The statute inflicts its penalty absolutely unless the defendant shows that he made a mistake after a *bona fide* and "reasonable attempt" to ascertain the age of the purchaser. The statute does not tell the bookseller what effort he must make before he can be excused. Does it require him to get a birth certificate or some other identification or is interrogation of the purchaser sufficient? If the interrogation merely consists of asking the purchaser for his age, would it be sufficient if the purchaser stated he was 17 or more?*

5. Depiction of an ardent kiss or embrace may result in a conviction under the definition in Section 1 (c). It reads, "Sexual conduct" means contact with a person's clothed ". . . genital, pubic area, buttocks or, if such person be a female, breast.

6. The appellee is mistaken in its contention that the void for vagueness doctrine is applicable only if the appellant can prove that he was injured by it in the instant case. This court has repeatedly held that a person whose conduct is affected by the statute may challenge its vagueness, even if not applicable to him. *Dombrowski* v. *Pfister*, 380 U. S. 479.

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* The State, in evident recognition of this defect, has since Ginsberg's conviction, amended the law, effective September 1, 1967 (Appendix A, p. 33 herein) adding the test: "Such minor exhibited to the defendant a draft card, driver's license, birth certificate or other official or apparently official document purporting to establish that such minor was seventeen years old or more."

7. Under the doctrine of *Stromberg* v. *California,* 283 U. S. 359, 368, the judgments resting, as they do on grounds that cannot be separated, must be reversed if one ground is invalid. Here, the trial court found the appellant guilty on all grounds alleged in the statute.

CONCLUSION

The judgments of conviction should be reversed and the informations directed to be dismissed.

In reviewing the judgments in this case, we trust that the court will pass upon the fundamental issue whether a statute may restrict sales of literature to persons because of their age. This is an important question that has been left open with resultant uncertainties to the entire book-publishing and book-distributing field. We are confident that the court will hold that such a statute, with special reference to the particular New York law, is repugnant to the Constitution of the United States.

Emanuel Redfield,
Counsel for Appellant.

APPENDIX A

The Statute

Section 484-h. Exposing minors to harmful materials.

1. Definitions. As used in this section:

(a) "Minor" means any person under the age of seventeen years.

(b) "Nudity" means the showing of the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state.

(c) "Sexual conduct" means acts of masturbation, homosexuality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or, if such person be a female, breast.

(d) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(e) "Sado-masochistic abuse" means flagellation or torture by or upon a person clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

(f) "Harmful to minors" means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, when it:

(i) predominantly appeals to the prurient, shameful or morbid interest of minors, and

(ii) is patently offensive to prevailing standards in the

adult community as a whole with respect to what is suitable material for minors, and

(iii) is utterly without redeeming social importance for minors.

(g) "Knowingly" means having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of both:

(i) the character and content of any material described herein which is reasonably susceptible of examination by the defendant, and

(ii) the age of the minor, provided, however, that an honest mistake shall constitute an excuse from liability hereunder if the defendant made a reasonable bona fide attempt to ascertain the true age of such minor.

2. It shall be unlawful for any person knowingly to sell or loan for monetary consideration to a minor:

(a) any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts nudity, sexual conduct or sado-masochistic abuse and which is harmful to minors, or

(b) any book, pamphlet, magazine, printed matter however reproduced, or sound recording which contains any matter enumerated in paragraph (a) of subdivision two hereof, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sado-masochistic abuse and which, taken as a whole, is harmful to minors.

3. It shall be unlawful for any person knowingly to exhibit for a monetary consideration to a minor or know-

ingly to sell to a minor an admission ticket or pass or knowingly to admit a minor for a monetary consideration to premises whereon there is exhibited, a motion picture, show or other presentation which, in whole or in part, depicts nudity, sexual conduct or sado-masochistic abuse and which is harmful to minors.

4. A violation of any provision hereof shall constitute a misdemeanor. Added L. 1965, c. 327, eff. September 1, 1965.

The statute was amended by Chapter 791 of the Laws of 1967 (Session Laws, 190th Session—1967) to read as follows:

§ 235.20 Disseminating indecent material to minors; definitions of terms.

The following definitions are applicable to sections 235.21 and 235.22:

1. "Minor" means any person less than seventeen years old.

2. "Nudity" means the showing of the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state.

3. "Sexual conduct" means acts of masturbation, homosexuality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or, if such person be a female, breast.

4. "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

5. "Sado-masochistic abuse" means flagellation or torture by or upon a person clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

6. "Harmful to minors" means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, when it:

(a) Predominantly appeals to the prurient, shameful or morbid interest of minors; and

(b) Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and

(c) Is utterly without redeeming social importance for minors.

§ 235.21 Disseminating indecent material to minors.

A person is guilty of disseminating indecent material to minors when:

1. With knowledge of its character and content, he sells or loans to a minor for monetary consideration:

(a) Any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts nudity, sexual conduct or sado-masochistic abuse and which is harmful to minors; or

(b) Any book, pamphlet, magazine, printed matter however reproduced, or sound recording which contains ny matter enumerated in paragraph (a) hereof, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sado-masochistic abuse and which, taken as a whole, is harmful to minors; or

2. Knowing the character and content of a motion picture, show or other presentation which, in whole or in part, depicts nudity, sexual conduct or sado-masochistic abuse, and which is harmful to minors, he:

(a) Exhibits such motion picture, show or other presentation to a minor for a monetary consideration; or

(b) Sells to a minor an admission ticket or pass to premises whereon there is exhibited or to be exhibited such motion picture, show or other presentation; or

(c) Admits a minor for a monetary consideration to premises whereon there is exhibited or to be exhibited such motion picture, show or other presentation.

Disseminating indecent material to minors is a class A misdemeanor.

§ 235.22 Disseminating indecent material to minors; presumption and defense.

1. A person who engages in the conduct proscribed by section 235.21 is presumed to do so with knowledge of the character and content of the material sold or loaned, or the motion picture, show or presentation exhibited or to be exhibited.

2. In any prosecution for disseminating indecent material to minors, it is an affirmative defense that:

Appendix A.

(a) The defendant had reasonable cause to believe that the minor involved was seventeen years old or more; and

(b) Such minor exhibited to the defendant a draft card, driver's license, birth certificate or other official or apparently official document purporting to establish that such minor was seventeen years old or more.

SUPREME COURT, U. S.
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JOHN F. DAVIS, CLE

(Submitted upon consent of the parties.)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 47

SAM GINSBERG,

Appellant,

against

THE STATE OF NEW YORK,

Appellee.

BRIEF OF AMERICAN BOOK PUBLISHERS COUNCIL, INC. AS *AMICUS CURIAE*

HORACE S. MANGES,
Attorney for American Book Publishers Council, Inc.,
Office & P. O. Address,
60 E. 42nd Street,
New York, N. Y. 10017.

HORACE S. MANGES,
MARSHALL C. BERGER,
WEIL, GOTSHAL & MANGES,
Of Counsel.

TABLE OF CONTENTS

	PAGE
Interest of American Book Publishers Council, Inc. ..	1
ARGUMENT	2
POINT I—Section 484-h is unconstitutional in that it makes criminal the dissemination of non-obscene material	2
POINT II—The statute is unconstitutionally vague	6
Conclusion	7

TABLE OF CASES

Bookcase, Inc. v. *Broderick,* 18 N. Y. 2d 71 (1966)	3
Burstyn v. *Wilson,* 343 U. S. 495 (1952)	6
Butler v. *Michigan,* 352 U. S. 380 (1957)	6
Memoirs v. *Massachusetts,* 383 U. S. 413 (1966)	2, 4
Mishkin v. *New York,* 383 U. S. 502 (1966)	4
Roth v. *United States,* 354 U. S. 476 (1957)	3
Smith v. *California,* 361 U. S. 147 (1959)	4, 5
Winters v. *New York,* 333 U. S. 507 (1948)	6

IN THE

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SAM GINSBERG,

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BRIEF OF AMERICAN BOOK PUBLISHERS COUNCIL, INC. AS *AMICUS CURIAE*

Interest of American Book Publishers Council, Inc.

American Book Publishers Council, Inc. of 1 Park Avenue, New York, N. Y. is a membership corporation composed of most of the leading publishers of books of general circulation, including many university presses. It is estimated that the 195 members of the Council publish and distribute over 85% of all general books published in the United States. Neither Appellant nor the publisher of the works in question is a member of the Council.

The Council is deeply interested in safeguarding freedom of the press as guaranteed by the First and Fourteenth Amendments to the Federal Constitution. It sought leave to and did obtain consent of the parties

to file this brief because it believes that Section 484-h of the New York Penal Law is unconstitutional. The Council as a matter of policy takes no position with respect to the obscenity *vel non* of any publication and, therefore, this brief will not address itself to the magazines here involved.

ARGUMENT

POINT I

Section 484-h is unconstitutional in that it makes criminal the dissemination of non-obscene material.

The statute involved here, Section 484-h of the New York Penal Law, is an attempt to reach out and render criminal the dissemination of works which are not obscene. This appears from the face of the statute. It attempts to transmute the various elements which this Court has required to be established in order to prove a work obscene and hence not protectible by the First Amendment. Compare Section 484-h New York Penal Law with *Memoirs* v. *Massachusetts,* 383 U. S. 413, 418 (1966). But the statute goes beyond the elements so delineated by this Court and, of necessity, restricts material protected by the First Amendment. For example, this Court requires that before a work can be adjudged to be obscene it must appeal to "a prurient interest in sex". The statute requires an appeal "to the prurient, *shameful* or *morbid* interest *of minors*". (Emphasis supplied.) The words "shameful" and "morbid" are clearly an attempt to add something not covered by the word "prurient". Similarly, the statute encompasses not only what is "patently offensive" and "utterly without redeeming social importance" but also restricts the dis-

semination of material "patently offensive * * * *for minors*" and "utterly without redeeming social importance *for minors*". (Emphasis supplied.)

The New York Court of Appeals in interpreting this statute construed it as reaching non-obscene material but held such restriction to be permissible since only sales to minors are involved. Thus the New York Court of Appeals stated in *Bookcase, Inc.* v. *Broderick*, 18 N. Y. 2d 71, 75 (1966):

> "The clear implication of these cases is that material which is protected for distribution to adults is not necessarily constitutionally protected from restriction upon its dissemination to children. In other words, the concept of obscenity or of unprotected matter may vary according to the group to whom the questionable material is directed or from whom it is quarantined. Because of the State's exigent interest in preventing distribution to children of objectionable material, it can exercise its power to protect the health, safety, welfare and morals of its community by barring the distribution to children of books recognized to be suitable for adults."

Since *Roth* v. *United States*, 354 U. S. 476 (1957), this Court has held that while obscene material is not protected by the First Amendment, non-obscene material is and hence cannot be suppressed or restricted in the guise of curbing obscenity. Thus this Court stated in *Roth*:

> "It is therefore vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest." At p. 488.

In *Smith* v. *California,* 361 U. S. 147, 152 (1959) this Court pointed out that:

> "our holding in *Roth* does not recognize any state power to restrict the dissemination of books which are not obscene."

Similarly, in *Memoirs* v. *Massachusetts, supra,* at p. 418, n. 6 and *Mishkin* v. *New York,* 383 U. S. 502, 506 (1966), this Court sustained the criminal obscenity statutes of Massachusetts and New York respectively although they included in their definition of obscenity words other than "prurient" upon the ground that the state courts in question had construed these other words to be "synonymous with 'obscene'".

Here, however, we have additional words in a definition of restricted material which have not been construed to be synonymous with obscene but rather as words intending to reach and restrict material which is not obscene. We submit, therefore, that the statute is unconstitutional as a restriction on dissemination of non-obscene material.

The danger in such a statute is graphically revealed by the facts in this case. Defendant owns and operates a luncheonette, stationery and candy store in Bellmore, New York. He claims he did not see which publications had been purchased by the minor in question, since he was too busy in the other operations of his small store. To busy shopkeepers, such as the defendant, the statute would impose the practical mandate not to offer for sale any material, whether obscene or not, conceivably reachable by Section 484-h. Offering such material for sale means that a minor might purchase the material at a time when the shopkeeper is too busy to determine the character of the work, as he usually is, and hence the shopkeeper could be guilty of violating the statute. The only safe

way to live under such a statute is to restrict dissemination to everyone, minor and adult alike.

Defendant is typical of the modern paperback bookseller. In large part, paperbacks are sold by stores which are not predominantly booksellers but rather offer racks of paperback books in conjunction with a variety of other goods and services. But sellers such as candy stores, drug stores, variety stores, greeting card shops and newsstands do not have the time or facilities to determine which books are purchased by minors or what the contents of such books are. The net effect of statutes such as 484-h upon such a seller would be to force him not to carry any book possibly covered by it in order not to run the risk of prosecution. Thus everyone, minor and adult alike, would be unable to obtain through the customary channels of paperback distribution books which are not obscene. With the diminution of the outlets for such books, book publishers would become more and more reluctant to publish them. Additionally, art work for book covers would be substantially restricted. It would certainly not be economically feasible to create and print separate book covers of the same book for adults and minors. Accordingly, only those book covers which are safe for sale to minors would be available to adults. Thus in order to allegedly protect minors, all readers would be limited in their choice of reading material.

As this Court stated in *Smith* v. *California, supra,* at p. 154.

> "* * * his timidity in the fact of his absolute criminal liability, thus would tend to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly. * * * Through it [the bookseller's self-censorship], the distribution of all books, both obscene and not obscene, would be impeded."

To thus effectively restrict the dissemination of literature to the entire community, under the guise of protecting the youth of the community, would be, as Mr. Justice Frankfurter termed it in *Butler* v. *Michigan*, 352 U. S. 380, 383 (1957), "to burn the house to roast the pig."

POINT II

The statute is unconstitutionally vague.

We have pointed out in Point I that the statute goes beyond this Court's definition of obscenity and restricts material not covered by that definition. But the statute never articulates how far beyond the definition of obscene material it intends to go. Dissemination of "shameful" and "morbid" material to minors is made criminal, but nowhere are the limits of these broad, vague and open-ended words delineated. Resort to the dictionary only compounds the confusion as to the meaning of the words. See *Burstyn* v. *Wilson*, 343 U. S. 495, 533 (1952) (concurring opinion holding "sacrilegious" to be unconstitutionally vague). Also uncertain are the exact bounds of standards designed for adults when they are altered to apply to minors. Such a vague, indefinite statute is, we submit, unconstitutional under this Court's decision in *Winters* v. *New York*, 333 U. S. 507 (1948). This Court's comments at pp. 519-520 of *Winters* applies equally to the statute now before this Court:

> "It does not seem to us that an honest distributor of publications could know when he might be held to have ignored such a prohibition".

CONCLUSION

For the reasons above stated we urge this Court to hold Section 484-h of the New York Penal Law unconstitutional.

Respectfully submitted,

HORACE S. MANGES,
Attorney for American Book Publishers Council, Inc.,
Office & P. O. Address,
60 E. 42nd Street,
New York, N. Y. 10017.

HORACE S. MANGES,
MARSHALL C. BERGER,
WEIL, GOTSHAL & MANGES,
Of Counsel.

SUPREME COURT, U. S.

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JOHN F. DAVIS, C

(Submitted upon consent of the parties.)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 47

SAM GINSBERG,

Appellant,

against

THE STATE OF NEW YORK,

Appellee.

BRIEF OF THE AUTHORS LEAGUE OF AMERICA, INC. AS *AMICUS CURIAE*

IRWIN KARP
Attorney for The Authors League of America, Inc.
Amicus Curiae
Office & P. O. Address,
120 Broadway
New York, N. Y. 10005

32 CASE PRESS INC., 421 HUDSON ST., N.Y.—ORegon 5-4540

TABLE OF CONTENTS

	PAGE
Brief *Amicus Curiae*	1
Interest of the Authors League	1
ARGUMENT:	
POINT I—The Statute invades the First Amendment rights of authors, publishers, the public—and booksellers—by compelling the bookseller to determine, under threat of criminal sanction, if a book is obscene for minors	2
(i) Scienter and Censorship	3
(ii) The Bookseller Cannot Defend A Book's Right To Be Sold	4
(iii) Obscenity for Minors Should Not Be Regulated by Methods Which Unduly Restrain Constitutionally Protected Materials	9
POINT II—The Statute restricts the sale of material which is fully protected by the First Amendment	12
(i) The Statute Restricts Material Which Is Not Obscene	12
(ii) A Standard of Variable Prurient Interest Will Not Protect First Amendment Rights	13
(iii) The Definition of Obscenity for Minors Should Be Based on Mr. Justice Stewart's Description of Hard-Core Pornography	15
POINT III—The Statute does not provide the procedural safeguards required by the First and Fourteenth Amendments	17
CONCLUSION	19

PAGE

Authorities Cited

Cases

Bantam Books v. Sullivan, 372 U.S. 58 (1963) 7, 8, 9
Bunis v. Conway, 17 A.D. 2d 207 (1962) 6, 7

Ginzburg v. United States, 383 U.S. 463 (1966) 5, 15

Interstate Circuit v. City of Dallas, 366 F. 2d 590 (1966) 12, 13

Jacobellis v. Ohio, 378 U.S. 184 (1964) 2, 12, 13, 15

Lamont v. Postmaster General, 381 U.S. 301 (1965) .. 18

Memoirs v. Massachusetts, 383 U.S. 413 (1966) 5
Mishkin v. New York, 383 U.S. 502 (1966) 5

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 8

People v. Fritch, 13 N.Y. 2d 119 (1963) 5

People v. Richmond County News, 9 N.Y. 2d 578 (1961) 15

Roth v. United States, 354 U.S. 476 .....13, 14, 15

Shelton v. Tucker, 364 U.S. 479 (1960) 2, 9
Smith v. California, 361 U.S. 147 (1959) 2, 3, 17

Time, Inc. v. Hill, 385 U.S. 374 (1967) 3, 8

United Artists Corporation v. City of Dallas (No. 64) 18

Winters v. New York, 333 U.S. 507 (1948) 14

Zeitlin v. Arnebergh, 59 C. 2d 901 (1963) 7, 8, 11

Miscellaneous

New York Penal Law, Sec. 484 (h) (now Secs. 235.20-235.22) 2, 4, 5, 13, 17

New York Penal Law, Sec. 235.05 ..... 2, 13

New York Code of Criminal Procedure, Sec. 22-a 9

IN THE

Supreme Court of the United States

October Term, 1967

No. 47

SAM GINSBERG,

Appellant,

against

THE STATE OF NEW YORK,

Appellee.

BRIEF OF THE AUTHORS LEAGUE OF AMERICA, INC. AS *AMICUS CURIAE*

Interest of the Authors League

The Authors League of America, Inc. is a national society of professional writers and dramatists. One of its principal purposes is to express the views of its members in controversies involving the rights of free speech and free press. Because the determination of the issues presented in this case may significantly affect those fundamental rights, the Authors League respectfully submits this brief, as *amicus curiae,* in support of appellant.

POINT I

The statute invades the First Amendment rights of authors, publishers, the public—and booksellers—by compelling the bookseller to determine, under threat of criminal sanction, if a book is obscene for minors.

Whatever definition of obscenity for children is permissible under the First Amendment, the method of enforcement embodied in the New York statute imposes an unconstitutional restraint of the freedom of speech of authors, publishers, and the public—as well as booksellers. The Law compels a bookseller, on penalty of fine or imprisonment, to decide whether each book or periodical he sells (1) depicts "nudity . . . sexual conduct . . . sexual excitement . . . or sado-macochistic abuse . . ." and, if so, (2) whether such material is "harmful to minors" under a trilogy of abstruse criteria. (Sec. 484 (h); now Secs. 235.20-235.22, New York Penal Law). As indicated in Point II, we believe the statute applies to constitutionally protected material.

But even if the statute be construed as pursuing only the purpose this Court has indicated is "legitimate"—preventing the dissemination of obscene material to children—it does so "by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." (*Shelton* v. *Tucker*, 364 U.S. 479, 488). The statute's method of enforcement still threatens "a total suppression of material" not obscene for adults (*Jacobellis* v. *Ohio*, 378 U.S. 184, 195); it will restrict the adult "public's access to forms of the printed word which the state could not constitutionally suppress directly" (*Smith* v. *California*, 361 U.S. 147, 154); and it will restrict the sale to children of material protected by the First Amendment. It will thus invade the

First Amendment rights of authors, publishers and the public (adult and minor), as well as the rights of book sellers—rights which are guaranteed "for the benefit of all of us." *Time Inc.* v. *Hill,* 385 U.S. 374, 389.

We submit that if the First Amendment rights of all concerned are to be adequately protected a bookseller should not be subjected to punishment for selling a book to a child unless its "obscenity" has previously been established by the State in a judicial proceeding against the publisher. As indicated below, New York, and other States, have statutes which provide—or could be easily amended to provide—for such procedures.

The First Amendment rights of all concerned are seriously endangered when the charge of obscenity against a book is tried in a criminal (or civil) action against an individual bookseller. The book's right to be sold may lose, by default. Moreover, the penalties and risks which the statute imposes on the bookseller lay the foundation for the most insidious forms of grass-roots censorship and self-censorship. *Smith* v. *California,* 361 U.S. 147.

(i) Scienter and Censorship

In *Smith* v. *California,* the Court considered one effect of a "bookseller" statute. If a bookseller can be convicted without proof he knew the contents of a work, he will "restrict the books he sells to those he has inspected" and "if the contents of bookshops and periodical stands were [thus] restricted . . . they might be depleted indeed." (at p. 153). His fears will lead him to drastic "self-censorship" of the works he sells and "thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature." (at p. 153)

But the restrictive effects cannot be avoided merely by requiring the State to prove *scienter*. Under Sec. 484(h) a bookseller faced the threat of being charged with (i) "general knowledge . . . or reason to know . . . the character or contents . . ." or (ii) "grounds for belief" which oblige him to inspect the work. Under the amended Sec. 235.22, the bookseller is "presumed [to have] knowledge of the character and content" of the book. Under either version there would still be the pressure on him to inspect; and therefore the same process of self-censorship condemned in *Smith*. (Indeed, the new section is fatally defective because it does not require the State to prove *scienter;* it creates a presumption the bookseller must rebut.)

But even if the new statute clearly required the State to prove *scienter,* it would still be [as is Sec. 484(h)] a deadly threat to First Amendment rights. The risk that a Court would find *scienter* was proven will always exist—the methods by which the Act is employed and enforced make it likely. More important, for the reasons discussed below, the mere fact that a prosecution can be commenced—at which stage *scienter* need only be charged—makes the statute a potent weapon of repression.

(ii) The Bookseller Cannot Defend a Book's Right To Be Sold

Obviously, booksellers do not have the time to inspect the works they sell for "obscenity" (or, "harmfulness") for minors. More important, they are not capable of making the very difficult determination of whether a book is "obscene" for minors; nor can they afford to "back up" such a determination (if they make one) by defending the book in a criminal or civil suit.

From the judicial history of the *Roth* standard, it is obvious that even a bookseller with a law degree would have great difficulty deciding whether many works were obscene—for adults or children. For example, a majority (4) of the New York Court of Appeals concluded that TROPIC OF CANCER was so clearly obscene (for adults) that "if, as the County Court held [TROPIC OF CANCER] is not obscene as a matter of law, it is difficult to conceive when, if ever, a book can be held obscene under any established legal standard" (*People* v. *Fritch*, 13 N.Y. 2d 119, 124). But the minority (3) said the majority opinion was "no more than an expression of individual view having no support aside from its own pronouncement" and that the prosecution of TROPIC "call[s] to mind the book burning of eighteenth-century Europe and New England" (pp. 129, 132). Equally sharp differences of opinion, and equally conflicting expressions of certainty as to the obscenity and non-obscenity of the same work, have characterized opinions of the highest state courts and, indeed, of this Court (cf. *Ginzburg* v. *U. S.*, 383 U.S. 463; *Mishkin* v. *New York*, 383 U.S. 502; *Memoirs* v. *Massachusetts*, 383 U. S. 413).

If the determination of obscenity is so frequently difficult for appellate judges, can we really expect a bookstore manager, or stationery store proprietor, to decide if the next ULYSSES or LADY CHATTERLY'S LOVER is obscene [under Sec. 484 (h)] for a 16-year old high school student. Or can we expect that, having decided the book is not obscene, he would sell it—if he risks a jail term should it later develop that his judgment, unfortunately, conformed to the minority, rather than the majority, opinion of the New York Court of Appeals or this Court. And is it realistic to expect that a bookseller will repeat this process of difficult judg-

ment and risk-taking, book after book, periodical after periodical.

Common sense tells us that he cannot, and will not, make these decisions or act on them when they may cost him money or even his freedom. Most certainly, he will not do so, in the case of books or periodicals which are under attack from public officials or private groups. Thus, in the very situations where the constitutional guarantees of free speech and press should serve their purpose, the statute brings the greatest pressure to bear on the weakest link in the chain of communication to cut off those freedoms—to suppress circulation.

Inevitably booksellers will receive advice or warnings from police officials, district attorneys, or citizens' groups, that various books and magazines violate the New York Statute if sold to children. The bookseller will thus face the risk that having been put on warning, *scienter* may be held proved. He faces the risk that the book may be held obscene, even though he thinks it is not. He faces the risk if he sells it to a child under 17, through mistake or misstatement of age (by the child), that he may go to jail. Most important, he faces the risk of a proceeding. If the warning comes with sufficient emphasis, or from official sources, or from more than one source, the bookseller is likely to take the easiest course—to simply return the works or refuse to accept them.

The Statute is a natural breeding ground for these restrictive pressures; and for the resulting grass-root censorship and self-censorship they create. In *Bunis* v. *Conway*, 17 A.D. 2d 207, 210, the Court said:

> "Booksellers are naturally reluctant to incur the risk of criminal prosecution since that entails ad-

> verse publicity and physical and mental strain as well as expense, even though the prosecution should ultimately terminate in the dismissal of the charge. They may therefore refrain from selling the book denounced by the authorities and, in that event, no occasion for criminal prosecution ever arises. The mere threat of prosecution may thus have the effect of deterring or suppressing the sale of the book without any judicial determination ever being made as to whether the book is actually obscene. Such a system of informal censorship has been repeatedly condemned as a prior restraint by the action of governmental officials, in violation of the First and Fourteenth Amendments."

See also *Zeitlin* v. *Arnebergh,* 59 C. 2d 901.

Undoubtedly, it is the threats and risks which bookseller statutes create that give teeth to the often successful efforts by official and private groups to compel booksellers to stop selling books which are protected by the First Amendment against restrictions, for children or adults. (cf. *Bantam Books* v. *Sullivan,* 372 U.S. 58, 67; *Bunis* v. *Conway,* 17 A.D. 2d 207, 210).

The possibilities for suppression of works protected by the First Amendment are so great under the Statute because the bookseller does not have the resources or motivation to defend one book, or several books, against charges of "obscenity", or "harmfulness", to minors. As this Court pointed out in *Bantam Books, Inc.* v. *Sullivan* (372 U.S. 58, 65) one "who is prevented from selling a few titles is not likely to sustain sufficient economic injury to induce him to seek judicial vindication of his rights . . ." He cannot afford to bring a declaratory judgment action to clear every book that is placed under a cloud by threats of police

or prosecutors; nor even to pay an attorney's fee for a legal opinion that the book is not "harmful to minors." He is even less likely to risk paying a fine or undergoing the costs of defending a criminal prosecution. Inherent in a system of regulation thus aimed primarily at the bookseller is the restraint imposed by "fear of the expense involved" in defending against prosecutions. For the bookseller who has so little at stake, this threat of expense "must inevitably cause (him) to 'steer . . . wider of the unlawful zone.' *New York Times Co.* v. *Sullivan*, 376 U.S. at 279." *Time, Inc.* v. *Hill*, 385 U.S. 374, 389.

Moreover, by thus diverting the fundamental issue of "obscenity"—of a book's right to be sold—to a proceeding aimed at the bookseller, the New York Statute effectively deprives its publisher of his freedom of speech. As this Court pointed out in *Bantam Books* v. *Sullivan*, 372 U.S. 58, 64-65, freedom of press protects circulation, as well as publication, of a book; and the direct result of a restriction aimed at preventing booksellers from selling it, is to curtail the publisher's right of freedom of press.

Even if the publisher could intervene in prosecutions against stores which sold his book, the Statute produces unconstitutional restraints on his freedom of speech. Suppression can occur without ever commencing a prosecution; or the bookseller may capitulate, drop the book and accept a dismissal. Moreover, as the Supreme Court of California pointed out, even the acquittal of a bookseller in one prosecution would not prevent prosecutions against other sellers of the book—in other counties of the state, or even in the same country. "Such an approach" it said "must inevitably engender a hodgepodge pattern of suppression and sale." *Zeitlin* v. *Arnebergh*, 59 C. 2d 901, 907.

(iii) Obscenity for Minors Should Not Be Regulated by Methods Which Unduly Restrain Constitutionally Protected Materials

In regulating the dissemination of obscene materials to children, the State should be "highly selective" in its choice of remedies, adopting a method designed to achieve that "narrow" purpose rather than one that also "broadly stifle(s)" material which is constitutionally protected for distribution to children or adults. *Shelton* v. *Tucker,* 364 U.S. 479, 488.

New York has not been "selective". On the contrary it has adopted a statute which generates a maximum, rather than a minimum, of improper restraint on constitutionally protected books and periodicals. It does so by permitting the prosecution of a bookseller for selling to a minor a book which has not been judicially determined to be obscene; and posing the threat that the book may later be ruled obscene, in a prosecution based on the sale. The bookseller will be driven to suppress books that he is actually entitled to sell because he is incapable of making the difficult determination of obscenity himself and cannot afford to seek a judicial determination, book-by-book, in declaratory judgment actions or in defending criminal prosecutions under the statute.

A statute with this potential for suppression can hardly qualify as the "sensitive tool" which this Court said must be used in the "separation of legitimate from illegitimate speech"; it is scarcely a "most rigorous procedural safeguard(s)" or "adequate bulwark" for freedom of speech. *Bantam Books* v. *Sullivan,* 372 U.S. 58, 66.

The statute's potential for suppression—through self-censorship and grass-roots censorship of booksellers (cen-

sorship by threat)—would be eliminated by adding a requirement that a bookseller could only be prosecuted for selling a book if it had previously been judged obscene for children, in a single civil or criminal proceeding brought against its publisher—provided that the publisher had made himself amenable to such proceedings in New York.

This requirement would not hamper proper enforcement of the statute against booksellers or others who sold a book which was indeed obscene for children. A prompt, judicial determination that it was obscene could be obtained in a proceeding against the publisher or his designated distributor—under a statute such as Sec. 22-a of New York's Code of Criminal Procedure, which provides for injunction proceedings against publishers and distributors of obscene material. (By a simple amendment, Sec. 22-a could also deal with material obscene for children.)

Moreover, such a proceeding is much more likely to be a truly adversary one, in which the book's right to be sold would be vigorously defended. It is much less likely that the right would be lost by default, or through inadequate defense—a grave threat when the issue is determined in a prosecution of the bookseller under the present statute.

The requirement that obscenity first be determined in a proceeding against the publisher also serves the State's interests. First, it helps insure that the statute will not suppress the sale to children or adults of material protected by the First Amendment—a result which the State of New York is obviously interested in obtaining. Second, the requirement will avoid the multiplicity of local prosecutions against the same book which the present law permits—it will obviate a "hodge-podge pattern of suppression and

sale." *Zeitlin* v. *Arnebergh,* 59 C. 2d 901, 907. Third, it will simplify local enforcement and eliminate the potential for grass-roots censorship. Police officials and district attorneys would not longer have to make ill-founded threats or charges that particular books or periodicals violated the law; they would be able to make simple, factual statements that specific works had been judged obscene in judicial proceedings. The bookseller could easily verify this information.

Obviously, the requirement could only apply to a book whose publisher was amenable to process—either as a domestic corporation or resident; or, in the case of foreign publishers, by some voluntary act. Foreign publishers should not be compelled to submit to New York jurisdiction for civil or criminal purposes. However, if they or their designated distributors do not, then booksellers would not have the protection of the requirement for such a prior determination of obscenity in selling their books.

It may be contended that the State would have insufficient time to cope with periodicals that are only on sale for a limited period. However, there are alternative methods for assuring that the question of obscenity be first determined in a proceeding against the publisher of such works. For example, the requirement of a prior determination of obscenity, in the case of magazines sold for brief periods of time, could be limited to those magazines whose publishers or distributors *elected* to submit them to the Attorney General, within a specified number of days before they are placed on sale in the State. This would give the State an opportunity to determine the question of obscenity in a proceeding against the publisher, and would thus protect retailers. We

hasten to add that obviously such submission could not be required. The question of obscenity could also be brought to test in a proceeding against the publisher by a statutory requirement that it identify for booksellers those of its works which were not to be sold to children under the statute.

POINT II

The statute restricts the sale of material which is fully protected by the First Amendment.

In *Jacobellis* v. *Ohio,* 378 U.S. 184 (1963), Mr. Justice Brennan suggested that the states consider whether the preferable method of "preventing the dissemination of *material deemed harmful* to children" might be to adopt "laws aimed specifically at preventing the distribution of *objectionable material* to children, rather than at totally prohibiting its dissemination" (p. 195). (Emphasis supplied.)

We agree with the United States Court of Appeals in *Interstate Circuit, Inc.* v. *City of Dallas,* 366 F. 2d 590, that "harmful" or "objectionable" material is synonymous with "obscene material," and that a State may not restrict dissemination to children of material on grounds other than obscenity.

(i) The Statute Restricts Material Which is not Obscene

The New York Statute, by its terms, seems designed to reach material that is not obscene for minors, whether obscenity be judged by a constant standard—or a variable standard, such as that applied in *Interstate Circuit,* where the Court concluded that obscenity for children should be

judged by "the prurient interest of its intended and probable recipient group" (366 F. 2d 590, 596). For example, paragraph (1)(b) prohibits "nudity" as a category separate and apart from "sexual conduct"; and paragraph (1)(e) also deals with types of conduct unrelated to sex. In *Roth* v. *United States*, 354 U.S. 476, the Court said that "obscene material is material which deals with sex in a manner appealing to prurient interest" (p. 487). The Court did not adopt in its entirety the American Law Institute's definition, in which nudity as well as sex are included in the category of the obscene. Moreover, the statute only makes it a crime to sell or loan proscribed material "for *monetary consideration* to a minor" (emphasis supplied). By contrast, the New York prohibition against obscene material (Sec. 235.05, Penal Law) prohibits the promotion or possession of any obscene material. It seems doubtful that if Section 484(h) (now Secs. 235.20-22) was intended to apply only to obscene material, it would exculpate any transfer of material simply because money did not change hands.

(ii) A Standard of Variable Prurient Interest Will not Protect First Amendment Rights

But assuming that the New York statute is intended—or construed—to prohibit only the sale of material which is obscene, we respectfully submit that it does not limit itself to a constitutionally valid test, because it embodies a variable standard of prurient interest, similar to that employed by the Court of Appeals in *Interstate Circuit Inc.* v. *City of Dallas, supra.*

We respectfully submit the use of a variable standard—based on the assumption that "children" as a group have a

single, ascertainable "prurient interest" — will inevitably and unconstitutionally restrain circulation of books and periodicals which are protected by the First Amendment, whether distributed to children or adults.

The statute applies to children of all ages—up to 17. Obviously, the prurient interest of a child of 9 is different from that of a 12-year old; and the prurient interest of a 13-year old is radically different from that of a college or high school student a few days short of his 17th birthday. It would not even be theoretically possible for jury or judge to determine whether a given book was obscene for "minors" unless it be assumed that all are to be governed by the lowest common denominator of prurient interest, or that "obscenity" is a complete "variable"—shifting from one age level to the next, as the child progress from kindergarten to college.

To add a "variable" prurient interest to the test of obscenity would be to add another ambiguous factor which will make the *Roth-to-Memoirs* standard even more difficult to use. Clearly the standard is not now an easy one to apply. *Jacobellis* v. *Ohio,* 378 U.S. 184, 187, 191. It has frequently proven difficult for even appellate judges; the sharp difference of opinion in the New York Court of Appeals as to whether TROPIC OF CANCER was obscene under the *Roth* test, is a not unusual sample of the problem appellate judges face with the standard. With "prurient interest" made a variable, the *Roth* standard could not possibly give publishers or booksellers that degree of "fair notice of what acts will be punished" which is so essential to the protection of free speech. *Winters* v. *New York,* 333 U.S. 507, 509.

(iii) The Definition of Obscenity for Minors Should be Based on Mr. Justice Stewart's Description of Hard-Core Pornography

If the Court is to depart from the *Roth* standard in defining material which is obscene for children, then we respectfully submit that it should consider whether the result might be better achieved by adopting a definition based on the description of "hardcore pornography" made by Mr. Justice Stewart in *Ginzburg* v. *United States,* 383 U.S. 463, 499. In enumerating the kinds of materials he meant by the term, Mr. Justice Stewart included:

> "photographs, both still and motion picture, with no pretense of artistic value, graphically depicting acts of sexual intercourse, including various acts of sodomy and sadism, and sometimes involving several participants in scenes of orgy-like character . . . drawings in comic book format grossly depicting similar activities . . . pamphlets and booklets, sometimes with photographic illustrations, verbally describing such activities in a bizarre manner with no attempt whatsoever to afford portrayals of character or situation and with no pretense to literary value."

(cf. *People* v. *Richmond County News,* 9 N.Y. 2d 578, 587)

A definition of obscenity for children based on Mr. Justice Stewart's description of "hardcore pornography" would be less difficult for judges, prosecutors, publishers and booksellers to apply. It would reduce the temptation to substitute personal concepts of "obscenity" for the complex *Roth* standard or one made even more complex by the factor of variable "prurient interest." This would greatly minimize the danger that such regulations produce a "total suppression of such material" or "reduce the adult population . . .

to reading only what is fit for children'' (*Jacobellis* v. *Ohio*, 378 U.S. 184, 195).

We do not contend that the description need be the same as that which would apply to material disseminated to adults. But we doubt that a definition of ''obscenity'' for children need move beyond the boundaries of Justice Stewart's definition. Wherever the line be drawn, we respectfully submit that it cannot be carried much beyond the limitations of his classification without affecting books which are by no means obscene for children and which present problems of taste and parental responsibility, rather than ''obscenity'' or a proven causal relationship to anti-social conduct.

Some parents may decide that a given book or periodical, though not obscene, is not suitable for their children. But the decision is one that they should make and enforce on an individual basis. Other parents may reach the opposite conclusion. Others may abdicate their responsibility. But this does not warrant the great risks to freedoom of speech which inevitably follow from extending restrictions into the area of the non-obscene. This is particularly so, since any such restriction of publication will leave untouched many other, and more potent, influences on the development of a child's character and personality: including the other media which expose him to the world and sex (television, the daily newspapers, national magazines and records), his day-to-day experiences beyond the walls of his home, and the fundamental influences which shape him before he is old enough to buy books, or even to read.

POINT III

The statute does not provide the procedural safeguards required by the First and Fourteenth Amendments.

The statute does not contain procedural safeguards required by the First Amendment. By imposing liability for sale of "obscene" books to children under 17, the statute imposes a formidable deterrent upon the bookseller; one that cannot be excused by analogy to statutes which restrict conduct unaffected by the First Amendment, such as the sale of liquor to minors (cf. *Smith* v. *California,* 361 U.S. 147, 152-153). To avoid liability for inadvertently selling a proscribed book to a 15 or 16-year-old, who has falsely stated he is 17, the bookseller would have to make considerable efforts to obtain satisfactory evidence of the age of each adolescent to whom he sold a copy of a publication proscribed by the statute—and to preserve that evidence in case he is prosecuted. (Indeed, Sec. 235.22 now specifies the types of official documentation a bookseller would have to obtain, to excuse a sale to a child under 17.)

In the face of the very considerable burden and risk thus involved in selling books prohibited by the statute, the safer alternative for a bookseller would be not to stock any book which might be judicially determined to be obscene for children or claimed to be obscene by public officials. The liquor store whose entire stock is banned to children has no choice; but the bookseller has a choice between "safe" and "unsafe" books. It is, indeed, the choice which makes the risk of inadvertently selling such books to children under 17 too great to take—and which makes the penalty such a serious restraint on books intended for adult readers.

The Dallas ordinance, which is before the Court in *United Artists Corporation* v. *City of Dallas* (No. 64), at least partially recognizes this problem; and seeks to dissuade lying by punishing the child who misstates his age. New York does not even provide this safeguard. But even such a provision does not afford a sufficient margin of error for the protection of the bookseller's and publisher's right of free speech. If a child of 10 states he is 17, a bookseller could not believe him. But a 15-year old child may well look 17. A bookseller should be entitled to rely on a child's statement of his age so long as it is not beyond some prescribed and reasonable boundary of belief—for example, so long as a child's actual age is within three years of the statutory minimum. The ordinance should explicitly provide this safeguard. It should not require the bookseller obtain documentary evidence. This would impose a considerable burden on many stores that have a constant flow of business and carry a large selection of periodicals and paperback books; and an even greater burden on those retail establishments which also sell many other types of merchandise. The burden of documenting (and recording the evidence of) the age claim of every youth who may look 17 and who buys a periodical or paperback book which may be proscribed under the statute is an "inhibition" of free speech prohibited by the First Amendment. *Lamont* v. *Postmaster General*, 381 U.S. 301.

CONCLUSION

It is respectfully submitted that the judgment appealed from should be reversed.

Respectfully submitted,

IRWIN KARP
Attorney for The Authors League of America, Inc., Amicus Curiae
120 Broadway
New York, New York 10005

SUPREME COURT, U. S.
NOV 22 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States.

October Term, 1967
No. 47

SAM GINSBERG,

Appellant,

vs.

THE STATE OF NEW YORK,

Appellee.

On Appeal to the Appellate Term of the Supreme Court of the State of New York, Second Judicial Department.

Brief Amicus Curiae of Citizens for Decent Literature, Inc., an Ohio Corporation, in Support of Appellee.

CHARLES H. KEATING, JR.,
3300 Carew Tower,
Cincinnati, Ohio 45202,

JAMES J. CLANCY,
9055 La Tuna Canyon Road,
Sun Valley, Calif. 91352,

RAY T. DREHER,
111 South Bemiston Avenue,
Clayton, Missouri 63105,

Counsel for Amicus Curiae.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

SUBJECT INDEX

Page

Interest of Amicus Curiae 1

Statement of the Case 2

People of the State of New York: Case in Chief .. 3

Sam Ginsberg: The Defense 10

The People of the State of New York: Rebuttal 16

Summary of Argument 19

Argument 24

I.

New York Penal Law Section 484(h), Which Utilizes the Variable Concept of Obscenity, Is Constitutional. Since the Statute Does Nothing More Than Proscribe the Sale or Loan to Minors Under 17 of Subject Matter Which Is Obscene to Such Minors, This Court's Decision Is Controlled by the Roth-Alberts Ruling in 1957, and the Ginzburg-Mishkin Rulings in 1966 24

A. The Construction of Section 484(h), Adopted by the New York Court of Appeals, i.e., That the Statute Employs the Variable Concept of Obscenity and Proscribes the Sale or Loan to Minors Under 17 of Subject Matter Which Is Obscene to Such Minors, Is Binding on This Court .. 24

B. A Statute Employing Variable Concepts of Obscenity and Proscribing the Sale or Loan to Minors Under 17 of Subject Matter Which Is Obscene to Such Minors Has Its Parallel in Section 1141, Proscribing the Sale of "Sadistic" and "Masochistic" Materials and Should Be Controlled by the Principles Expressed by This Court in Mishkin v. N.Y. 29

Page

II.

The Magazines Are "Harmful to Minors" Within the Tests Set Forth in the Statute. Further, the Scienter Requirement, and Evidence Thereon, Present No Constitutional Infirmity 36

III.

Section 484(h) Will Not by Itself Solve This Nation's Obscenity Problem. Ginsberg v. New York Should Be Affirmed Upon the Reasoning of Judge Learned Hand and the Constitutional Views Expressed by Justice John Marshall Harlan 38

Conclusion 50

Appendix A. Photographs.

Appendix B. Miscellaneous Cases From News Accounts and Other Sources 1

TABLE OF AUTHORITIES CITED

Cases — Page

Aday v. U.S., 18 L. Ed. 2d 1309 .....40, 45
Alberts v. California, 354 U.S. 476 ....19, 35, 36, 37, 52
A Quantity of Books v. Kansas, 18 L. Ed. 2d 1314 41
Austin v. Ky., 16 L. Ed. 2d 438 .....39, 40, 43, 44, 45
Avansino v. N.Y., 18 L. Ed. 2d 1308 40
Bloomberg v. N.Y., 18 L. Ed. 2d 1306 40
Bookcase, Inc. v. Broderick, 18 N.Y. 2d 71, 271 N.Y.S. 2d 947 .....27, 35
Books, Inc. v. U.S., 18 L. Ed. 2d 1311 40
Cobert v. N.Y., 18 L. Ed. 2d 1305 40
Comm. of Pa. v. Robin, 218 A. 2d 546 40
Corinth Publications, Inc. v. Wesberry, 18 L. Ed. 2d 1310 40
Fried v. New York, 378 U.S. 578 45
Friedman v. N.Y., 18 L. Ed. 2d 1303 .....40, 45
General Trust Co. v. Blodgett, 287 U.S. 509 29
Gent v. Arkansas, 16 L. Ed. 2d 537 ....39, 40, 43, 44, 45
Ginsberg v, New York, 18 L. Ed. 2d 1344 .....2, 23, 36, 38, 47, 51
Ginzburg v. United States, 383 U.S. 463, 16 L. Ed. 2d 31, 86 S. Ct. 942 .....32, 40, 45, 51
Grove Press, Inc. v. Gerstein, 378 U.S. 577, 84 S. Ct. 1909, 62 L. Ed. 2d 1035 40
Jacobellis v. Ohio, 378 U.S. 184 .....45, 46
Jacobs v. N.Y., 18 L. Ed. 2d 1294 40
Keney v. N.Y., 18 L. Ed. 2d 1302 .....40, 45
Kingsley Pictures Corp. v. Regents, 360 U.S. 684 .....29, 37, 45

Page

Landau v. Fording, 18 L. Ed. 2d 1317 14

Mazes v. Ohio, 18 L. Ed. 2d 1315 41

Mishkin v. N.Y., 383 U.S. 502, 16 L. Ed. 2d 56, 86 S. Ct. 958 .....19, 20, 29, 30, 31, 35, 40, 45, 51

People v. Bookcase, Inc., 14 N.Y. 2d 409, 252 N.Y.S. 2d 433 27

People v. Brooklyn News Co., 12 Misc. 2d 768 30

People v. Charles Tannenbaum, 18 N.Y. 2d 268, 274 N.Y.S. 2d 131 .....27, 28

People v. Kahan, 15 N.Y. 2d 311 27

People v. Richmond County News, 9 N.Y. 2d 578 .. 26

Ratner v. Calif., 18 L. Ed. 2d 1304 40

Redrup v. N.Y., 16 L. Ed. 2d 438 ....39, 40, 43, 44, 45

Rosen v. United States, 161 U.S. 606 37

Rosenbloom v. Va., 18 L. Ed. 2d 1312 41

Roth v. United States, 354 U.S. 476 ....19, 35, 36, 37

Shackman v. Arnebergh, 58 F. Supp. 983 42

Shackman v. Calif., 18 L. Ed. 2d 1316 .....41, 42

Sumner v. Dial Press, 182 Misc. 416, 48 N.Y.S. 2d 480 29

Tannenbaum v. N.Y., 18 L. Ed. 2d 1300 40

United Artists Corporation v. City of Dallas, 18 L. Ed. 2d 620 48

United States v. Kennerley, 209 Fed. 119 37

United States v. Levine, 83 F. 2d 156 ..20, 34, 35, 37

United States v. Rebhuhn, 109 F. 2d 512, cert. den. 60 S. Ct. 976, 84 L. Ed. 1399, 310 U.S. 629 32

Wenzler v. Pitchess, 18 L. Ed. 2d 1351 41

Miscellaneous

Page

New York Times of March 27, 1966, Sec. 2, p. 9 .. 11

U.S. News & World Report, Oct. 2, 1967, p. 84 51

U.S. News & World Report, Oct. 9, 1967, p. 74 51

Statutes

American Law Institute Model Penal Code, Sec. 207.10, pp. 36-38 33

New York Penal Law, Sec. 235 .....20, 32, 33, 34

New York Penal Code, Sec. 311.3 46

New York Penal Law, Sec. 484(h) 3, 11, 19, 20, 24, 27, 28, 29, 33, 34, 36, 46, 49

New York Penal Law, Sec. 484(h)2(a) 3, 24

New York Penal Law, Sec. 484(h)2(b) 3, 24

New York Penal Law, Sec. 484(i) 27

New York Penal Law, Sec. 1141 .....19, 26, 29

United States Constitution, First Amendment 2, 19

United States Constitution, Seventh Amendment 21, 37

Textbook

Pollock and Maitland, History of English Law (2d Ed. 1952), p. 624 37

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Interest of Amicus Curiae.

Citizens for Decent Literature, Inc., an Ohio Corporation, with local affiliates throughout the United States, is a non-profit, non-sectarian and non-political corporation with national headquarters in Cincinnati, Ohio, formed for and dedicated to the cause of good, decent and wholesome literature with a view to oppose and eliminate obscene literature, by cooperating with law enforcement in the enforcement of the laws. For the Court's convenience amicus curiae is hereinafter referred to by the single short title, CDL.

CDL believes that there exists a growing flood of publications, purposely designed and manufactured with

a sensationalized appeal to prurient interest, that threatens to overthrow the basic morality upon which our Nation and our Constitution were founded; that while the First Amendment of our Constitution has, from the time of our Nation's founding, been construed to afford no protection to such publications, a loud voice is now being heard in the court room advocating the overruling of this "balancing of interest" interpretation in favor of an absolutist approach, aimed at nullifying the Nation's basic obscenity laws.

Sam Ginsberg v. The State of New York, is a case of nationwide importance which will have a serious effect on enforcement of the obscenity statutes throughout the Nation.

Statement of the Case.

Appellant Sam Ginsberg is the owner of a candy, stationery and luncheonette establishment at 1507 Bellmore Avenue, North Bellmore, Nassau County, New York [R. 156]. The store which he had owned since January 1964 and had operated with the help of his wife is approximately 30 feet deep and 12 feet wide [R. 73, 156, 157, Deft. Ex. C] and was the sole source of appellant's income [R. 157]. In his business he also sold newspapers and 175 to 200 types of magazines [R. 157]. Photographs of the inside of his shop, and of his magazines rack are attached hereto as Appendix A, being copies of Defendant's Exhibits A through D, and people's Exhibit 1.

On October 27, 1965, an information in two counts was filed in the District Court of Nassau County against John Doe, A/K/A Sam c/o Sam's Stationery, 1507 Bellmore Avenue, Bellmore, New York, sup-

ported by the affidavit of Richard Lance Corey, aged 16 and his mother Mary Corey, alleging that the defendant had on October 18, 1965, sold Richard Lance Corey, aged 16, two magazines known as "Mr. Annual" and "Sir", in violation of Section 484(h) of the Penal Law of the State of New York. Count 1 named the two magazines and charged a violation of subsection 2(a) and Count 2 named the same magazines and charged a violation of subsection 2(b) [R. 2, 3, 4]. On October 28, 1965, a second information in two counts was filed in the same court against Sam Ginsberg [R. 48], supported by the affidavit of detective Albert Anderson, attached to the Vice Squad, Nassau County Police Department, alleging that the defendant had on October 26, 1965, sold Richard Lance Corey, aged 16, two magazines known as "Man to Man" and "Escapade", in violation of Section 484(h) of the Penal Law of the State of New York. Count 1 named the two magazines and charged a violation of subsection 2(a) and count 2 named the same two magazines and charged a violation of subsection 2(b) [R. 4, 5]. Photographs of the covers of the four magazines are attached hereto as Appendix A, being copies of the covers of People's Exhibits 1-4.

The case came on for trial on April 18, 19, and 20, 1966, before District Court Judge Julius Chinman, sitting without a jury.

People of the State of New York: Case in Chief.

Richard Lance Corey testified for the state, that on October 18, 1965, and on October 26, 1965, he was 16 years of age and a student in the 11th grade at Mepham High School [R. 20, 36]. He said that at about six or seven p.m., on October 18, 1965, he visited Sam's

Luncheonette and Stationery Store on Bellmore Avenue in North Bellmore, where he purchased two magazines, "Sir" and "Mr. Annual" [R. 24, 26]. When he walked into the shop he said, "Hi" to Sam, whom he knew pretty well [R. 22]. He had been in that shop a total of about 50 times [R. 21]. At the time of the purchase Mr. Ginsberg was behind the store counter [R. 28]. He picked up the magazines, "Sir" and "Escapade" from the magazine rack which was directly across and at an angle from the counter and went up to Mr. Ginsberg who came to the end of the counter [R. 28]. He held the two magazines in his left hand in an off-center fashion so that the prices of each magazine showed, and asked Mr. Ginsberg how much they cost [R. 30]. He said that Mr. Ginsberg looked down at the magazines and told him the price [R. 29]. He had about $2.00 with him [R. 24]. He pulled the dollar bills out of his back pocket and gave them to Mr. Ginsberg and received the change [R. 28, 29]. He identified Mr. Ginsberg in the courtroom as the one who had sold him the magazines [R. 30]. When he left the store he gave the magazines to his father who was waiting for him outside [R. 31]. He identified his initials "R. C." on the magazines and said he put them on the same day that he purchased them, as he had been instructed to by the detective [R. 26]. The magazines "Sir" and "Mr. Annual" were identified and received in evidence as People's Exhibit 2 and People's Exhibit 3. A photograph of the magazine rack marked People's Exhibit 1 was received in evidence [R. 23].

Richard Corey testified that on October 26th at about 4:00 p.m., he returned to Sam's where he purchased two more magazines, "Escapade" and "Man to Man". With him at this time were two detectives, one of whom

was Detective Anderson. One detective preceded him into the shop and was sitting at the counter, having coffee, when he entered. As he was giving the money to Sam for the magazines he purchased on that date, the other, Detective Anderson, came in and asked for a package of cigarettes [R. 33, 34]. On that occasion he picked up "Escapade" and "Man to Man" from the rack and approached Sam, who was at the end of the counter. When he was two feet from him, he said, "Hello" and "How much?", which was the extent of their conversation. He said he gave him $2.00 at the most and got change [R. 34, 35]. Thereafter he walked outside, placed his initials on the purchases and gave them to Detective Anderson [R. 36]. He identified his initials "R.C." on "Escapade" and "Man to Man", which were marked as People's Exhibits 4 and 5 and received into evidence [R. 37].

On cross-examination by defense attorney Morris J. Ezra, witness Corey testified that he lived about a mile south of Sam's store and that he went into Sam's store for the first time in July of 1965 because his girl friend, whom he met in July, lived a block away. He had stopped in on the way to her house [R. 43, 44, 46]. Asked if they had "Man to Man" or "Escapade" in the public library, he answered, "No, sir". Asked if he ever saw any books on architecture of synagogue anywhere in the library, he answered, "No, but they probably have some" [R. 48]. When asked by the Court if he had purchased these kinds of magazines before, he said, "Yes" he had purchased other magazines at Sam's, and that his mother had seen them. As a result of subsequent conversations with his mother and father, it had been arranged for him to go in and buy these magazines with his father outside [R. 49,

63]. Asked by defense counsel whether his father told him to go and buy these magazines from this particular store, he said, "Not these exact magazines. He said, 'Go in there and get some juicy magazines.'" [R. 48]. His mother called the detectives the day after the purchase. He stated that he had purchased magazines of this kind elsewhere. [R. 47]. Asked where Mr. Ginsberg was at the time of the October 26th purchase, he indicated by an "X", the opening between the food counter and the gum counter, as shown on a photograph of the inside of the shop, which was thereafter introduced into evidence as Defendant's Exhibit A. He marked the position he occupied with the initials "R.C." [R. 60, 61]. Defendant's Exhibit B, a photograph of the inside of the shop taken from behind the counter and showing the magazine rack was received into evidence [R. 63].

On re-direct examination, by Assistant District Attorney Robert Rivers, witness Richard Corey testified that prior to his making the first purchase on October 18th with his father, his mother had gone down to the store and talked to Sam [R. 68]. Mr. Ginsberg's manner of talking to his mother had made him mad and so, on or about October 11 or 12, which was a day or two after his mother had visited the store, he had a conversation with Mr. Ginsberg. He said, "I visited him to take the magazines behind the rack or at least put them behind the counter. At least this way he wouldn't get in trouble with the law. He started telling me it wasn't my business. He started telling me a story about Adam and Eve. My girl friend was sitting right next to me when he was telling me this. . . . I told him I'm not exactly what I said. But, I know I said something about my age being 16 because my

mother was there a couple of days before. . . ." [R. 64, 65].

On re-cross-examination by defense attorney Ezra he stated he had an idea that there was a law about selling magazines of this type to persons of a certain age, but that he wasn't sure what age. He said that he had learned this during attempts to purchase magazines of this kind from other store owners, who sometimes would ask him how old he was [R. 70].

Mary Corey, testified for the state that she was the mother of Richard Lance Corey and that he was born on September 11, 1949, and was 16 years and 1 month on the date of the purchase on October 18th. She identified Mr. Ginsberg in the courtroom as the person with whom she had a conversation in October of 1965, at Sam's Luncheonette [R. 71]. At that time she approached Mr. Ginsberg with her 6-year old son and said, "I want to compliment you on your wide range of pornography." When Mr. Ginsberg asked her who she was, she said, "I am Lance Corey's mother. . . . You sold my son magazines when he was still 15 years old. He just turned 16 a few weeks ago. . . . You have these out in the open. You would probably even sell them to my child, my 6-year old child here with me." She then stated that Mr. Ginsberg said, it has nothing to do with me, that it was no concern of his how old anyone is, if he wants to buy a magazine, he may purchase it [R. 73, 74]. After this conversation she returned home and called the Seventh Precinct [R. 75]. She stated that on October 18th, her husband and son came home with two magazines [R. 75] and thereafter on October 26th, she accompanied her son, Detectives Anderson and Sgt. Groh on another visit to the store.

She remained outside in the car and observed her son come out with two magazines, identified by her as Exhibits 4 and 5, which were initialed by her son in her presence and turned over to the detective [R. 76, 77].

Asked on cross-examination by defense attorney Ezra if Mr. Ginsberg did not ask her, "Who is your son?" she replied, "He knew my son by the name Lance". Asked if she did not say to Mr. Ginsberg, "You know my son Lance, why did you sell him these?" she replied, "I did not ask him 'Why'. I said, you sold my son Lance these filthy magazines when he was still 15 years old. He just turned 16 a few weeks ago." [R. 78, 79]. The Court sustained objections to questions regarding the witness' opinion as to whether other materials were offensive to her taste, but indicated he would permit questions regarding her opinion as to the magazines in question [R. 85]. Defense counsel replied: "Your Honor, I won't go into the question of these things."

Detective Groh testified for the state that he was a member of the Nassau County Police Department and had been for 13 years, being currently assigned to the investigation of gambling, vice, and pornography [R. 88]. In the course of his duties he had gone to Mr. Ginsberg's place of business in a car with Detective Anderson, Richard Corey and Mrs. Corey and was seated at the counter when Richard Corey came into the store [R. 89]. He heard Mr. Ginsberg say, "Hello, Lance" and saw Richard Corey go over to the magazine rack where he looked through the magazines for three to four minutes. Lance then picked up a couple of magazines, went over to Mr. Ginsberg, held the magazines in one hand, spread somewhat like the cards in a

poker hand, and gave him some money and Mr. Ginsberg gave Lance some change. At this time he was 15 to 20 feet away. As Lance was paying Mr. Ginsberg, Detective Anderson came in and stood alongside of him. Then Lance walked out and two or three minutes later he also walked out [R. 90]. Thereafter they met in the car where Lance initialed the magazines and he took custody of them. He identified Exhibits 4 and 5 as the magazines which he saw Richard Corey purchase [R. 91, 92].

On cross-examination by defense attorney Ezra, Detective Groh testified that there was no one other than the defendant working in the store that he could see [R. 94]. The Court sustained an objection to the introduction, through the witness, of defendant's Exhibit C for identification when the witness stated it did not appear to be a fair representation. The Court noted that the picture was taken with a short-focus lens and appeared to have a great deal of distortion [R. 95, 97]. The witness testified that the magazine rack was on the left side of the store as one entered and about 6 to 8 feet from the front and approximately 10 to 15 feet from where he sat at the counter [R. 98-99]. He could hear conversation, but he could not make out what they were saying [R. 101]. He saw Lance give Mr. Ginsberg two $1.00 bills and hold the magazines in two hands, indicating the manner [R. 102].

The People of the State of New York rested their case.

The defense attorney moved to dismiss on various grounds and renewed all pre-trial motions, which were denied by the Court.

Sam Ginsberg: The Defense.

Allen M. Hannington testified that he had been a photographer since 1939 and had been employed as such by Drennan Photos Inc., Mineola, N.Y., and took photographs of Mr. Ginsberg's shop in the course of his employment [R. 121]. Defendant's Exhibit C, a photograph taken at the rear of the shop looking toward the front and Defendant's Exhibit D, a photograph taken at the rear of the shop depicting a food case, cash register, mixing machines, coffee urns and cigarette display, were received in evidence [R. 128, 131].

Reverend George L. S. Stowell, testified for the defense that he was the pastor at St. Marks Episcopal Church in North Bellmore [R. 135]. He had come to know the defendant and his wife well in the two years that he had conducted the store [R. 137]. He said that he visited the defendant's store twice a day to get the morning and afternoon papers and other small items and had taken the young people of the church there for lunch [R. 136]. He stated he had discussed Mr. Ginsberg with others in the community and they had said his reputation for honesty, virtue and truthfulness was good [R. 139].

On cross-examination by Assistant District Attorney Rivers Father Stowell testified he was a married Episcopal priest. Shown Exhibits 3 and 4 he said he did not know that Mr. Ginsberg exhibited such magazines for sale. Asked if he knew that it was alleged that the defendant sold such material to a 16-year-old, he said he had heard so last night for the first time [R. 141, 142]. He stated that if investigation showed that Sam had taken the initiative of selling pictures like that to 15 and 16-year olds, he would take a dif-

ferent opinion of him [R. 143]. Shown page 57 on People's Exhibit 4, he stated that he considered a picture of this kind would encourage the immoral attitudes or prurient interest of over half the young people under 17. He considered that such a picture would be patently offensive to prevailing standards in the adult community as a whole with respect to what was suitable material for minors [R. 144]. Shown page 51 of People's Exhibit 5 by the Court, he stated that such a picture had no social value for children under 17 years of age, encouraged them to occasions of sin, offered no help in their biological education, and had a degrading influence on them [R. 145]. Asked if his opinion as to the defendant's reputation would be different if, when confronted by the parent whose 16-year old son had been sold these magazines, and her 6-year old son, the defendant was heard to say, "I'll sell them to anyone", and when asked whether or not "anyone" meant the 6 year old, the defendant was heard to say, "Anyone", he answered, "Well, I wouldn't make any statement as to his reputation" [R. 146].

On re-direct examination by defense attorney Ezra, the Court sustained an objection to questions regarding the social importance to minors under the age of 17 of pictures not in evidence. The Court stated that the issue was whether the sale of Exhibits 2, 3, 4 and 5 was in violation of Section 484(h) [R. 147, 148] and that what is published in another magazine has nothing to do with the issue in this case [R. 149]. Page 9 of Section 2 of the New York Times of March 27, 1966, was marked, Defendant's Exhibit E for identification, but was not admitted into evidence [R. 153].

Sam Ginsberg, the defendant, testified that he had owned and he and his wife had operated a candy store, stationery and luncheonette establishment at 1507 Bellmore for two years and four months and that it was his sole source of income. In this business he sold 175 to 200 magazines, which he purchased from G. N. S. News Company in Long Island, which was the only supplier of magazines in the area [R. 157, 160]. Twice a week, the magazines were sent in automatically and he had no choice in their selection [R. 158]. When the Court noted that other stationery stores in the area were offering magazines and yet had no girlie magazines on their shelves, the defense attorney commented that the Court did not know whether or not they had them behind the counter [R. 161]. Mr. Ginsberg stated that the first time he knew the witness Corey as Lance Corey was when he was served with the summons [R. 162]. He denied that he sold the books "Sir" and "Mr. Annual" to Corey on October 18th and denied selling him any book of that nature prior to October 18th. He also denied having a conversation with him regarding the removal of that type of book from the rack to behind the counter [R. 163]. He stated that he saw Richard Lance Corey come into his shop on October 26, 1965, between 5:00 anad 5:30 and at that time he was behind the counter and the detective was sitting at the counter with a cup of coffee [R. 164]. He stated that Corey selected his magazines, walked over between the gum counter and candy counter with the magazines folded under his right armpit and said, "Its $1.20, Sam". Corey gave him the exact change and by the time he came back and put the money in the register he was gone. He was not able to see the name or type of the magazines that he had

chosen, and he could not remember whether Corey mentioned the number of magazines or not [R. 165, 166]. Asked by the Court the price of his magazines, he stated they ran from 12¢ to $1.75. Asked if a customer took a magazine that sells for $1.75 and gave him 60¢ for it, if he would not be losing money, he answered, "yes". He stated that his customers were very honorable and that his inventories had shown that they never had taken a $1.75 magazine and given him 60¢. He said he had nice people there and that no one ever stole magazines or candy from his counter [R. 168]. He stated that he did not inquire of his regular customers what they took and that "It would be more embarrassing to ask them or question them" [R. 169]. He stated that while Richard Corey came in quite a number of times, he could not remember him every buying a magazine prior to October 26th and that on that date, when he said, "Here's a dollary twenty, Sam," he took his word for it [R. 170, 171]. On Defendant's Exhibit A, he indicated by an "S" where Richard Corey was standing when he gave him the money [R. 174]. He stated that Mrs. Corey came into his shop several days before October 26th and said, "I don't want you to sell any of these books to my son." and that he responded, "I don't know who your son is, Ma'am". At that time he didn't know her name or that of her son. He heard sounds of a discussion with his wife, but nothing more. She was by herself. He got busy and walked away. When he returned she was gone [R. 179].

On cross-examination by Assistant District Attorney Rivers, he stated that the magazines which were under Corey's armpit were practically together but it could be

seen that there were two magazines [R. 185]. He stated that he was aware of the contents of "Escapade", "Sir", "Man to Man" and "Mr. Annual", that "Escapade" contains stories, photos of girls in nude fashion and in different types of dress, and pictures of females with the entire breasts and buttocks exposed [R. 186]. He stated that in the ordering of magazines from G.N.S. he received a slip indicating the number of magazines and the price thereof which was checked before he put the magazine on the racks [R. 191, 194]. He stated that there were times when he inquired the age of the persons purchasing the girlie magazines—when he had the time and was not that busy. Asked how he would know what type of magazine Richard Corey was buying since his testimony was that the magazines were under his armpit, he said, "He could have had anything" [R. 198]. He denied making the statement attributed to him in Mrs. Corey's testimony. He stated he did not recall what his wife said to Mrs. Corey as he was quite busy [R. 204]. He recalled Richard Corey coming into the store with his girl friend but denied having any conversation with the boy regarding removal of the book or "Adam and Eve" [R. 205]. Asked what age group he felt Lance Corey fell into he said "The way he is dressed at times, he could be 17 or 18 or he could be 15 [R. 207].

During re-direct examination by defense attorney the Court called his attention to People's Exhibit 1 and the third column of Magazines from the right headed by "Escapade" and the titles, "Millionaire", "Man to Man", "Topper", "Gem", "Men's Digest", "Jaguar" and "Gent" and asked if in the process of putting them in the rack or taking them out of the rack he did not be-

come aware of the contents so that he could designate them as girlie magazines which contained pictures of bare breasts and bare buttocks, he answered, yes [R. 210].

Mrs. Pauline Ginsberg testified for the defense that she was the wife of the defendant Sam Ginsberg and the mother of his three children. She stated that she worked at the store most of the day and was present and vaguely recalled an instance when a woman came into the store and spoke to her husband about her son and magazines [R. 214]. She stated she was behind the counter and heard this woman shouting something about magazines at her husband. She did not hear too clearly what her husband said but did hear him say, "Who is your son, and who are you?" She testified she never heard her husband say, "I don't care how old he is. If he wants to buy magazines, he can buy them." She stated she walked over and asked, "Is there anything I can do to help you", whereupon the woman started to rave on about certain magazines. When she asked her, "Which magazines are you referring to" and "Who is your son" the woman replied, "Oh, you know what I'm talking about and stormed out of the store." [R. 215].

On cross-examination by Assistant District Attorney Rivers, Mrs. Ginsberg stated that at the time of the shouting her husband was about two to three feet away from the lady and that she herself was busy waiting on customers [R. 218-219]. She stated that she could not hear too clearly what her husband said to this lady but that she would have heard him say, "I don't care how old your son is. If he wants to buy magazines, he can buy them." but that "he did not say that". "He cannot say that." [R. 221].

She said she very rarely engaged in the sale of magazines and never had occasion to sell the magazines "Escapade", "Man to Man", "Mr. Annual" and "Sir" and had never observed them [R. 224]. She stated that she did not know who Mary Corey was [R. 225], nor did she or her husband attempt to hire Lance Corey as an employee [R. 228], nor did she tell Mrs. Corey when she was in the store yelling at her husband that if she took care of her own son and brought him up correctly, he would not buy such magazines [R. 227].

The defendant rested his case.

The People of the State of New York: Rebuttal.

Detective Anderson testified for the state in rebuttal, that he was a member of the Nassau County Police Department and had been for 13 years and in his capacity as a member of the Vice Squad visited Sam's Luncheonette on October 26, 1965 [R. 229]. He arrived there at about 5:10 in a patrol car in the company of Sgt. Groh, Mrs. Corey and Richard Corey. Sgt. Groh entered the premises at about 5:10 p.m. Richard Corey entered at approximately 5:14 and he entered at approximately 5:15. When he entered he stook directly next to Richard Corey [R. 230] who was standing at the entrance of the soda fountain speaking to Mr. Ginsberg. Sgt. Groh was seated at the soda fountain about 10 feet from Mr. Ginsberg. He identified Exhibit 4 as the magazine which Lance Corey had in his hand at the time and whose cover was visible. He saw Richard Corey hand currency to Mr. Ginsberg, who went to the cash register and returned with change for the boy. Thereafter the boy left [R. 231]. He followed the boy out. He placed his initials on the two magazines which Richard Corey gave him and he

had Richard Corey initial the magazines also. He identified Exhibit 5 as the second magazine purchased by Richard Corey [R. 232].

On cross-examination by defense attorney Ezra, Detective Anderson demonstrated how Richard Corey held the magazine when he was at the counter and the Court noted for the record that the front of the magazine was visible to anybody standing in front of that person [R. 235]. Asked by the Court how close he was to Richard Corey, he said a foot away [R. 239]. He also stated that he did not see Richard Corey place a magazine or magazines folded under his right arm nor did People's Exhibit 4 have any crease marks [R. 240].

The people rested and the defendant rested. The defendant moved to dismiss and renewed all pre-trial motions. After oral argument, the Court on April 20, 1966, made the following findings [R. 248-249]:

> "I find that the People have proved beyond a reasonable doubt that Richard Lance Corey on October 18, 1965, and October 26, 1965, was 16 years of age. That the defendant knew or had reason to know that Richard Lance Corey was under 17 years of age. That People's Exhibits 2, 3, 4 and 5 contained pictures and photographs depicting female nudities as defined by the aforesaid section. Further that People's Exhibit 5 and People's Exhibit 3 contained verbal descriptions and narrative accounts of sexual excitement and sexual conduct.
>
> "I find that the material as above set forth is harmful to minors in that I find that these photographs and articles are accounts which predominantly appeal to the prurient, shameful and morbid interest of minors and that in considering the

adult community as a whole, is wholly unsuitable material for minors under 17 years of age.

"I further find that Richard Lance Corey purchased People's Exhibits 2, 3, 4 and 5 from the defendant Sam Ginsberg and paid a monetary consideration therefor.

"I find that the defendant Sam Ginsberg knew the character and contents of People's Exhibits 2, 3, 4 and 5.

"I further find that the defendant Sam Ginsberg knew that Richard Lance Corey purchased these specific magazines in evidence in these cases as People's Exhibits 2, 3, 4 and 5.

"I therefore find that the defendant Sam Ginsberg is guilty of both counts of the charges set forth in CR3119 and guilty of both counts of the charges set forth in CR3125."

The trial court on May 17, 1966, suspended sentence on both counts.

On January 20, the Appellate Term of the Supreme Court of the State of New York, Second Judicial Department affirmed the judgments on both counts [R. 257] and on January 30, amended the judgments to indicate that the Court had considered the two constitutional questions which were raised, *i.e.*, freedom of the press, and vagueness and uncertainty, and had held the statute not repugnant to the United States Constitution on either ground [R. 261].

On January 24, 1967, Associate Justice John F. Scileppi denied defendant's petition for leave to appeal to that court [R. 262].

Summary of Argument.

I.

New York Penal Law Section 484(h), enacted in 1965, was designed to ameliorate the condition which existed because of the interpretation given to Penal Law Section 1141, *i.e.,* that that section proscribed "hard-core" pornography only. Although the statute uses the phrase "harmful to minors", the New York Court of Appeals has interpreted it to mean "obscene to minors" and the statute to employ variable obscenity concepts. This Court is bound by the state court's interpretation.

The issue that the terminology used here, "harmful to minors" is vague and proscribes material protected by the 1st Amendment was the same issue raised in *Mishkin v. New York* regarding the terms "sadistic" and "masochistic." In *Mishkin,* this Court held that it was bound by the state courts ruling that such words were synonymous with "obscene" and that there was no issue involved as to whether the word obscene was vague or offended the first amendment guarantees, having been decided in *Roth-Alberts.*

Similarly, the court held in *Mishkin* that the prurient appeal of the *Roth* rule could be tested in relation to a well defined class (sado-masochist) where it was clear from the nature of the materials that it was aimed at such audience. It is difficult to understand, in this parallel situation, how the principles expressed in that case, may not be considered to govern the issues in this case.

Since *Mishkin* involved the crimes of "publishing" and "possession for sale," the probable recipient audience was of necessity identified from an examination of the material. When however the materials are sold

directly to the special class, the only question is, "Do they appeal to the prurient interest of the special class?"

Contrary to the claim made by appellant, neither the Model Penal Code, nor New York Penal Law Section 235 (based upon the Model Penal Code and effective Sept. 1, 1967) supports his claim that the materal *itself* must be designed for "persons under 17." The requirements of those sections are stated in the alternative and mere proof that the subject matter was actually disseminated to a member of the special class of children would invoke the special rule.

Judge Learned Hand is the architect of variable obscenity—that principle appears throughout his obscenity opinions. Direct support for the validity of section 484 (h) is found in Judge Learned Hand's opinion in *U.S. v. Levine.*

There can be no question of the right of the legislature to establish a special class of "minors under 17". The legislature has found that such literature in the hands of such class of minors presents a clear and present danger to the State. The class is clearly defined as required by this Court's opinion in *Mishkin.*

II.

It would appear that appellant has raised an issue concerning the operation and effect of the statute—whether section 484(h) can be constitutionally applied to the four magazines in question.

Whether material is obscene to minors is a question of fact for the jury's determination. The scienter requirement affords no problem, that issue having been long ago decided in *Rosen v. U.S.* Acting as the finder of fact on those issues, the trial court's findings under

the Federal Constitution, and Seventh Amendment thereto, may not be reexamined in this Court.

As shown in the Statement of the case (*supra*), there is sufficient evidence to support Judge Chinman's findings of fact, both as to "obscenity" and as to "scienter".

III.

We are of the opinion that the reversals handed down in the obscenity cases during the 1966 term were wrongly decided. If this Court has accepted jurisdiction in this case for the purpose of establishing the minor's statute as the people's primary tool for fighting obscenity, it is proceeding unrealistically. That tool will not close the sluice gates on the new deluge of pornography which have been opened up by the results reached by this Court in the *Fanny Hill* case and in the 26 obscenity cases it reviewed during the 1966 term. A sample of such materials is attached hereto as Appendix "C".

Amicus is astounded at the work—product of this Court in the 26 obscenity decisions it rendered during the past term. Unable to decide the issue it framed for argument, it chose to decide those cases without benefit of briefing and argument—a most unfortunate decision. The results are totally irreconcilable with past decisions of this Court or any court this nation's history.

In the 26 cases, the materials were undeniably smut. The community standards of 11 states were in issue. In 8 cases, juries had made the determinations. In 11 of the cases, a hard-core pornography test was used. Each case had been approved by the appellate courts below, most by unanimous decisions. Yet, this court

saw fit to reverse 22 cases without any plausible explanation.

The inconsistent judgments of the individual justices are more fully described in the body of this argument. There is substantial evidence in the background facts of these cases to indicate that the members of this Court are making "personal" rather than "constitutional" judgments. Whereas in former cases the Court relied on redeeming social importance to establish its jurisdiction in such matters, none can be found in the subject matter of these cases and there is a serious question whether the Court in acting has not overstepped the limits of its jurisdiction.

We have searched without success for an answer to "why" the Court acted so unpredictably. If the reversals were accelerated by the appearance on the scene of a constitutionally sufficient minor's statute, with the thought of shifting emphasis to that type of law enforcement, this Court has been mislead—the minor's statute cannot be effectively enforced. Evidence of this can be found in those jurisdictions which presently have such statutes.

In order to make a minor's statute work, it is essential that a minor be used as an "operator", as in this case, Policy wise, this is bad practice, because of the "contributing to delinquency" factor. Beyond that consideration, few persons are willing to perform as have Mrs. Mary Corey and Richard Corey in this case. Nor is the mere presence of the statute a deterrent, as those jurisdictions having minor's statutes, can attest to.

If this Court were to shift the emphasis to the minor's statutes, it would work to defeat the primary pur-

pose of the obscenity statutes, which is, to get at the producers. By printing "For Adults Only" on such materials, the publisher would place himself beyond the reach of law enforcement.

The classification ordinance involved in the City of Dallas cases present a different problem than the minor's statute regulating the distribution of publications. In order to apply the latter regulation, it is necessary to enforce the restriction as to each seller—the successful application in one case has no effect on other cases. Not so in the classification situation. There, law enforcement acts to limit the exposure by totally limiting a segment of the audience.

This Court's decisions last term have opened the flood gates on a deluge of new pornography. Unless that area is checked, it will be impossible to keep the volume of such materials which are floating around from reaching the wrong audience.

We have appended hereto as Appendix "B" a synopsis of miscellaneous case histories indicating some of the troubles this nation is facing. The evidence is all around us that this nation in 1967 has embraced the monster vice. It was in this setting that this Court wrote its decisions last term. We reiterate our opinion that those cases were wrongly decided.

This Court should return to the norms of Ginzburg and Mishkin. *Ginsberg v. New York* should be affirmed but only upon the solid reasoning of Judge Learned Hand, and through acknowledgement of Justice Horlan's view regarding the limits of jurisdiction of this Court. The domain of sexual morality is primarily a matter of state concern and this Court should be slow to interfere with state legislation calculated to protect that morality.

ARGUMENT.

I.

New York Penal Law Section 484(h), Which Utilizes the Variable Concept of Obscenity, Is Constitutional. Since the Statute Does Nothing More Than Proscribe the Sale or Loan to Minors Under 17 of Subject Matter Which Is Obscene to Such Minors, This Court's Decision Is Controlled by the Roth-Alberts Ruling in 1957, and the Ginzburg-Mishkin Rulings in 1966.

A. The Construction of Section 484(h), Adopted by the New York Court of Appeals, i.e., That the Statute Employs the Variable Concept of Obscenity and Proscribes the Sale or Loan to Minors Under 17 of Subject Matter Which Is Obscene to Such Minors, Is Binding on This Court.

Appellant stands convicted of subsections 2(a) and 2(b) of Section 484(h) of the Penal Laws of New York. Those subsections read:

> "2. It shall be unlawful for any person knowingly to sell or loan for monetary consideration to a minor:
>
> "(a) Any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts nudity, sexual conduct or sado-masochistic abuse and which is harmful to minors, or
>
> "(b) Any book, pamphlet, magazine, printed matter however reproduced, sound recording which contains any matter enumerated in paragraph (a) of subdivision 2 hereof, or explicit and detailed

verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sado-masochistic abuse and which, taken as a whole, is harmful to minors."

"Minor," "nudity", "sexual conduct," "sexual excitement", "sado-masochistic abuse", and "harmful to minors", as used in those subsections are further defined in subsection 1(a) through (f) as follows:

"1. Definitions. As used in this section:

"(a). 'Minor' means any person under the age of 17 years.

"(b) 'Nudity' means the showing of the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernably turgid state.

"(c). 'Sexual conduct' means acts of masturbation, homosexuality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or, if such person be a female, breast.

"(d). 'Sexual excitement' means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

"(e). 'Sado-masochistic abuse' means flagellation or torture by or upon a person clad in undergarments, a masked or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

"(f). 'Harmful to minors' means that quality of any description or representation, in whatever

form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, when it: (i) Predominantly appeals to the prurient, shameful or morbid interest of minors, and (ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and (iii) is utterly without redeeming social importance for minors.

The "scienter" provisions read:

"(g). 'Knowingly" means having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquire of both: (i) the character and content of any material described herein which is reasonably susceptible of examination by the defendant, and (ii) the age of the minor, provided, however, that an honest mistake shall constitute an excuse from liability hereunder if the defendant made a reasonable bona fide attempt to ascertain the true age of such minor."

The above statute, enacted in 1965, was the outgrowth of an earlier decision of the New York Court of Appeals in *People v. Richmond County News,* 9 N.Y. 2d 578 (May 25, 1961), which, in a 4-3 decision, interpreted the New York State Obscenity Statute, Section 1141 of the Penal Law, to proscribe "hard-core pornography" only.

In the following years, the State Legislature, in their efforts to overcome some of the inherent difficulties of a "hard-core" test (which had the appearance of presenting a "constant" standard of obscenity), devoted their efforts toward an improvement of their Minor's

Statute. Their first attempt was struck down by the New York Court of Appeals, by 4-3 a vote, in *People v. Bookcase, Inc.*, 14 N.Y. 2d 409, 252 N.Y.S. 2d 433, July 1964 (Fanny Hill), and *People v. Kahan*, 15 N.Y. 2d 311 (March 18, 1965) (girlie magazines).

Thereafter, the State Legislature in 1965 adopted two separate and distinct approaches to the problem, which appear as Sections 484(h) (L 1965, ch. 327) and 484(i) (L 1965, ch. 372) of the Penal Laws. Section 484(h), set forth above, established a class of minors at 17 and below and required proof of scienter as to the minor's age. Section 484(i) established a class of minors at 18 and below and provided for strict liability in so far as age of the minor is concerned. The power of the Legislature to pass such statutes—variable concepts of obscenity—was contested and upheld in *Bookcase, Inc. v. Broderick*, 18 N.Y. 2d 71, 271 N.Y.S. 2d 947, appeal dismissed for want of a properly presented federal question, ... U.S. ....., 17 L. Ed. 2d 11, 87 S. Ct. ..... (Oct. 10, 1966). A conviction under Penal Law Section 484(i) involving a sale of the girlie magazine "Candid" to a 17-year old was appealed on the grounds of vagueness, due process of law, and failure to require proof of scienter as to age, and was upheld in *People v. Charles Tannenbaum*, 18 N.Y. 2d 268, 274 N.Y.S. 2d 131, appeal dismissed as moot, ... U.S. ....., 18 L. Ed. 2d 1300, 87 S. Ct. ..... (June 12, 1967). Although the latter decision involved Section 484(i), the New York Court of Appeals had occasion to comment on Section 484(h) in its opinion.

Thus, the New York Court of Appeals has already been called upon twice to interpret Section 484(h). In *Bookcase, Inc. v. Broderick, supra*, that court made it

quite clear that Section 484(h) employed variable obscenity concepts and proscribed only that which was obscene to minors under 17, saying at page 76:

> "Section 484-h uses, instead of the word 'obscene,' a three-point definition—(1) predominantly appeals to the prurient, shameful or morbid interest of minors, (2) is patently offensive to prevailing standards of what is suitable for minors, and (3) is utterly without redeeming social importance which is virtually identical to the Supreme Court's most recent statement of the elements of obscenity. . . .
>
> "It is clear that there is no such thing as 'obscenity in the air'—that is, obscene matter does not exist in a vacuum but can be found only by reference to the group *to* whom the matter is directed or *from* whom it barred. The Supreme Court has used as its reference point the entire adult community when dissemination was to the public at large and a particular deviant group when the materials were primarily designed and disseminated to that group. (See also U.S. v. 31 Photographs, 156 F.Supp. 350 (U.S. Dist. Ct., S.D.N.Y. 1957), When the 'adult only' type of statute is tested as here, the reference point is the community of minors. . . ."

In *People v. Tannenbaum, supra,* the New York Court of Appeals again stated that the statute proscribed only what would be "obscene" to minors under the variable concept of obscenity:

> "In response to the deeply felt needs of the community, our State Legislature enacted . . . statutes . . . proscribing the dissemination, to infants

under 17 . . . of materials *obscene as to such infants. . . .*" (Our emphasis.)

"In Bookcase v. Broderick, 18 N.Y.2d 71, decided July 7, 1966, we upheld the Legislature's power to employ variable concepts of obscenity."

Where the validity of a statute has been sustained in the face of federal objections, the Supreme Court must accept the state court's construction and proceed to test the validity on that basis. *General Trust Co. v. Blodgett,* 287 U.S. 509, 513; *Kingsley Pictures Corp. v. Regents,* 360 U.S. 684, 688.

B. A Statute Employing Variable Concepts of Obscenity and Proscribing the Sale or Loan to Minors Under 17 of Subject Matter Which Is Obscene to Such Minors Has Its Parallel in Section 1141, Proscribing the Sale of "Sadistic" and "Masochistic" Materials and Should Be Controlled by the Principles Expressed by This Court in Mishkin v. N.Y.

In *Mishkin v. N.Y.,* 383 U.S. 502, 16 L. Ed. 2d 56, 86 S. Ct. 958, appellant raised the same questions regarding the word "sadism" and "masochism" used in New York Penal Law, Section 1141, that appellant does here regarding the words "harmful to minors" used in Penal Law, Section 484(h). Mishkin argued that such terms were unconstitutionally vague and the proscription of such materials exceeded the First Amendment's guarantee. The trial court, the Appellate Division, and the Court of Appeals in that case all had interpreted the words "sadism" and "masochism" as synonymous with the word "obscene", which interpretation was consistent with prior trial court decisions. Complaint of *Sumner v. Dial Press,* 182 Misc. 416, 48 N.Y.S. 2d

480, *People v. Brooklyn News Co.*, 12 Misc. 2d 768, 771.

The opinion of this Court in *Mishkin v. N.Y., supra,* at page 60, settled those issues:

> "Appellant attacks section 1141 as invalid on its face, contending that it exceeds First Amendment limitations by proscribing publications that are merely sadistic or masochistic, that the terms 'sadistic' and 'masochistic' are impermissibly vague, and that the term 'obscene' is also impermissibly vague. We need not decide the merits of the first two contentions, for the New York courts held in this case that the terms 'sadistic' and 'masochistic' as well as the other adjectives used in Section 1141 to proscribe books, are 'synonymous with obscene.' 26 Misc.2d at 154, 207 N.Y.S.2d at 393. The contention that the term 'obscene' is also impermissively vague fails under our holding in Roth v. U. S. . . ."

And at page 61:

> "Indeed, appellant's sole contention regarding the nature of the material is that some of the books involved in this prosecution, those depicting various deviant sexual practices, such as flagellation, fetishism, and lesbianism, do not satisfy the prurient appeal requirement because they do not appeal to a prurient interest of the 'average person' in sex, that 'instead of stimulating the erotic, they disgust and sicken.' We reject this argument as being founded on an unrealistic interpretation of the prurient-appeal requirement.
>
> "Where the material is designed for and primarily disseminated to a clearly-defined deviant sexual

> group, rather than the public at large, the prurient-appeal requirement of the Roth test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group. The reference to the 'average' or 'normal' person in Roth, 354 U.S. at 489, 490, 1 L.Ed.2d at 1510, does not foreclose this holding. In regard to the prurient-appeal requirement, the concept of the 'average' or 'normal' person was employed in Roth to serve the essentially negative purpose of expressing our rejection of that aspect of the Hicklin test, Regina v. Hicklin (1868) L.R.3, Q.B.360, that made the impact on the most susceptible person determinative. We adjust the prurient-appeal requirement to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests of its intended and probable recipient group; and since our holding requires that the recipient group be defined with more specificity than in terms of sexually immature persons, it also avoids the inadequacy of the most-susceptible-person facet of the Hicklin test.
>
> "No substantial claim is made that the books depicting sexually deviant practices are devoid of prurient appeal to sexually deviant groups. . . ."

It is difficult to understand, in light of the nature of the *Mishkin* material and this Court's reasoning in the *Mishkin* case, noted above, how that case may not be considered determinative on the issues in this case. Not only has the Court of Appeals interpreted "harmful to minors" to mean "obscene to minors" but the State Legislature itself has, as noted by Justice Keating

above, defined it, using language which is identical to that used by certain members of this Court in what appears to be the most restrictive test for "obscene" yet devised.

The only difference is that Mishkin was charged with the crimes of "publishing obscenity" and "possessing obscenity for sale." Since no sale was involved, it was necessary to consider the probable recipient audience, *i.e.*, to whom the material was to be sold, or its equivalent, for whom it was designed. Here, however, the facts are otherwise and the issue is more narrowly drawn. The audience is identified by the charge, the charge being that appellant made several sales to a member of the special class. Appellant makes much of this in his brief, claiming an infirmity in the statute because it does not explicitly require that the material *itself* be "designed for" persons under 17 (Brief for Appellant, p. 20). But there is no such requirement under the law, as noted in *United States v. Rebhuhn,* 109 F. 2d 512, cert. den. 60 S. Ct. 976, 84 L. Ed. 1399, 310 U.S. 629, relied upon by this Court in *Ginzburg v. United States,* 383 U.S. 463, 16 L. Ed. 2d 31, 39, 86 S. Ct. 942. In *Rebhuhn,* the book "Sex Life in England" was written by and designed for men of science, yet that did not save him, because the material was *distributed* to a different audience. In *Ginzburg, supra,* at page 39, the same observation was made as to "The Housewife's Handbook on Selective Promiscuity".

Appellant is in error when he cites the Model Penal Code and New York Penal Law Section 235 (effective Sept. 1, 1967 and based on the Model Penal Code) in support of his proposition that the material *itself* must

also be "designed for" persons under 17. On the contrary, the requirements of those sections are stated in the alternative and support the validity of New York Penal Law, Section 484(h). The phrase "designed for" as used in those statutes means: "Directed to" or "aimed at". The reporter's comments to the American Law Institute Model Penal Code Section 207.10 provide at pages 36-38:

> "9. Obscenity Judged by Ordinary Adults, Unless Addressed to Special Audience. A fundamental question in current obscenity law is whether obscenity is to be measured by the response of average or normal individuals or by that of any child or perverted adult *to whose notice the material may come*. . . .
>
> "Subsection (2) of proposed Section 207.10 requires obscenity to be judged with reference to ordinary adults *unless the material* is designed for or *directed to children* or other specially susceptible audience. . . ." (Our emphasis.) Similarly New York Penal Law Section 235 (effective Sept. 1, 1967) provides:
>
> "Predominant appeal shall be judged with reference to ordinary adults unless it appears from the character of the material *or* the circumstances of its dissemination to be designed for children or other specially susceptible audience." (Our emphasis.)

Thus, mere proof that subject matter was actually disseminated to a member of the special class of children would invoke the special rule for children.

Appellant is in error when he credits Lockhart and McClure as the engineers of the so-called variable obscenity doctrine (Brief for Appellant, p. 19). Variable obscenity came into the law through the opinions of Judge Learned Hand. It is Judge Learned Hand's writings which form the foundation for not only the Model Penal Code sections on obscenity (of which he was one of the drafters), and New York Penal Law Section 235 (which is based on the Model Penal Code), but also the special minor's statute, which is at issue here, Section 484(h). In *United States v. Levine,* 83 F. 2d 156, 157 (1936), Judge Hand said:

> "What counts is its effect, not upon any particular class, but upon all those whom it is likely to reach. Thus, 'obscenity' is a *function of many variables.* . . .
>
> "The case was not tried on this theory; on the contrary, the judge supposed that a book or picture was obscene or innocent by an absolute standard independent of its readers. . . . He was in error. . . ." (Our emphasis).

And at page 158:

> "It may appear that the prospective buyer in the 8th count was a youth and that the accused had reason to suppose that he was. The evil against which the statute is directed, would then be the possible injury to such a youthful reader. It is when the crime consists of importing the work, or offering it for general sale, that the test cannot be found in the interests of those to whom it is sent, though abnormally susceptible. . . ."

United States v. Levine was cited with approval in the *Roth* case, 354 U.S. 476, fn. 26, as an example of the correct modern rule.

"Minors under 17" constitute a clearly defined class (*Mishkin, supra,* at page 62) which is worthy of special consideration and as to which there should be little question of constitutional infirmity. As the Court of Appeals noted in *Bookcase, Inc. v. Broderick, supra,* at page 77:

> "While our country was founded upon, and has thrived on, the unlimited exposure to all forms of religion and political ideologies, we know of no commitment in all of our history—from the Massachusetts Bay Colony to the freedom movements of today—to the exposure of our young to all forms of lust, perversion and sadism. . . ."

Further as pointed out by the same court at page 77:

> "Our own Legislature has declared by law that such literature is 'a contributing factor to juvenile crime, a basic factor in impairing the ethical and moral development of youth and a clear and present danger to the people of the state' (Penal Law Section 484-e)"

II.

The Magazines Are "Harmful to Minors" Within the Tests Set Forth in the Statute. Further, the Scienter Requirement, and Evidence Thereon, Present No Constitutional Infirmity.

It would appear that appellant has succeeded in raising an issue as to whether Section 484(h), assuming it is valid, can constitutionally be applied to the magazines in question: "Escapade", "Man to Man", "Sir" and "Mr. Annual". In his jurisdictional statement, appellant broadly phrases the first of two questions presented, as:

> "1. Is Section 484(h) of the Penal Law repugnant to the Constitution of the United States in that its *operation and effect* is to restrain expression in violation of the First and Fourteenth Amendments?" (Statement as to Jurisdiction, p. 3.) (our emphasis).

This Court noted jurisdiction on that question. *Sam Ginsberg,* 18 L. Ed. 2d, 1344 (June 12, 1967). In his Summary of Argument (Brief for the Appellant, p. 8) he says:

> "The magazines in question are not obscene by the Court's own decisions. The only charge against Ginsberg is that they contain nudes, in that the female breast is fully exposed. The trial court held that this alone fulfilled *all* the elements of the crime. *We urge that the magazines are not harmful to minors within the tests set forth in the statute.*" (Our emphasis.)

Whether material is obscene to minors is a question of fact for the jury's determination. *United States v. Kennerley,* 209 Fed. 119, 120 (S.D.N.Y. 1913), *United States v. Levine,* 83 F. 2d 156, 157 (1936), Pollock and Maitland, History of the English Law, 624 (2d Ed. 1952), *Roth v. United States,* 354 U.S. 476, 490. See also Justice Brennan dissenting in *Kingsley Books Inc. v. Brown,* 354 U.S. 436, at 448:

> "Jury trial of obscenity therefore provides a peculiarly competent application of the standard for judging obscenity which, by its definition, calls for an appraisal of material according to the average person's application of contemporary community standards."

The "scienter" requirement affords no problem. *Rosen v. United States,* 161 U.S. 606; *Roth-Alberts, supra,* fn. 28.

Where the jury is waived and tried to the court, the trial judge acts as the finder of fact, and this Court may not reexamine the question of fact presented in the lower court. U.S. Constitution and Seventh Amendment thereto. Trial Judge Chinman's findings of fact, both as to "obscenity" and "scienter" appearing at pages 17-18, *supra,* are supported by sufficient evidence. (See Statement of Case, *supra*). *United States v. Kennerley,* 209 Fed. 119 at 120.

III.

Section 484(h) Will Not by Itself Solve This Nation's Obscenity Problem. Ginsberg v. New York Should Be Affirmed Upon the Reasoning of Judge Learned Hand and the Constitutional Views Expressed by Justice John Marshall Harlan.

Amicus is gravely concerned by the radical change in attitude adopted by this Court in its treatment of obscenity cases during the 1966 October Term. We are of the opinion that those cases were wrongly decided.

If this Court has noted jurisdiction in *Sam Ginsberg v. New York* with the intention of establishing a minor's statute as the primary tool for the people to fight obscenity, it is proceeding unrealistically. This Court still has time and, through its opinion herein, should close the floodgates it opened in its decisions in *Redrup-Austin-Gent*, ... U.S. ...., 18 L. Ed. 2d 515, 87 S. Ct. .... (May 8, 1967) and other cases last term.

More important, however, we are concerned that this Court should know of the consequences flowing from those decisions, as witnessed in the immediate reaction thereto by the pornographers throughout the country. We have previously called the attention of this Court to the consequences flowing from its previous decisions in the cases decided on June 22, 1964. See Brief Amicus Curiae of Citizens for Decent Literature, Inc., filed in *A Book Named John Cleland's Memoirs of a Woman of Pleasure v. Attorney General of the Commonwealth of Massachusetts* at pages 79-84. An example of the new materials appearing on the market immediately after the decisions in *Redrup-Austin-Gent*, ... U.S. ....,

18 L. Ed. 2d 515, 84 S. Ct. ..... (May 8, 1967), is attached hereto as Appendix "C".*

Amicus is astounded at the work product of this Court during the past term—but we think a review of the results reached in those cases affords good reason for our astonishment.

Having accepted *Redrup v. N.Y.*, 16 L. Ed. 2d 438 (April 25, 1966), *Austin v. Ky.*, 16 L. Ed. 2d 438 (April 25, 1966) and *Gent v. Arkansas*, 16 L. Ed. 2d 537 (May 16, 1966) for argument on the scienter issue, while at the same time denying that the subject matter, therein involved, had constitutional protection, this Court was unable, seven months after oral argument and submission of the case, to resolve that issue. Instead of carrying the matter over to the following term for reargument, or expanding the issues for new

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*1: The Organization, Greenleaf Classics Inc. (GC 232).
2. The Autobiography of a Flea, Greenleaf Classics Inc. (GC 227).
3. Flossie, Pendulum.
4. Debauched Hospodar and Memoirs of a Young Rakehell, Holloway House (HH 145).
5. The Adventure of Father Silas and Flesh and Bone, Holloway House (HH 148).
6. Memoirs of Jospehine M., Continental Classics (CC 113).
7. Confessions of a French Countess, Continental Classics (CC 116).
8. The Way of a Man With a Maid, Victorian Classic (VC 103).
9. A Town Bull, Victorian Classic (VC 107).
10. Seduction of Suzy, Collectors Publication.
11. With Open Mouth, Collectors Publication.
12. The Awful Disclosures of Maria Monk, Bilife Publications (TNC 202).
13. Gay Sisters in Bondage TW 1-72.
14. Lesbian Collectors, TW 1-69.
15. The Memoirs of Josephine Mutzenbacher, Brandon House P 2033.
16. Modern Nudist No. 6.
17. Cheri No. 2.

argument, the Court handed down a flurry of decisions in cases which were never briefed, and which, taken individually and as a group, are irreconcilable with any of the past decisions of the United States Supreme Court in this area, during its entire history.

An analysis of the *Redrup-Austin-Gent* opinion shows it to add nothing new to other "no-clear majority" decisions of this Court. See Musmanno dissenting in *Comm. of Pa. v. Robin,* 218 A. 2d 546. That opinion says nothing more than this Court's *per curiam* decision did in *Grove Press, Inc. v. Gerstein,* 378 U.S. 577, 84 S. Ct. 1909, 62 L. Ed. 2d 1035 (June 22, 1964), except that Justices Warren and White changed sides, both having divergent views. Further, the 23 remaining decisions without opinion destroy completely the sanity which the *Ginzburg* and *Miskkin* opinions promised to bring to this area of the law. To say that the law is currently up in the air is an understatement of the true state of affairs.

A total of 26 cases involving obscenity determinations were decided by this Court. *Redrup v. N.Y.,* 18 L. Ed. 2d 515; *Austin v. Ky.,* 18 L. Ed. 2d 515; *Gent v. Arkansas,* 18 L. Ed. 2d 515; *Jacobs v. N.Y.,* 18 L. Ed. 2d 1294; *Tannenbaum v. N.Y.,* 18 L. Ed. 2d 1300; *Keney v. N.Y.,* 18 L. Ed. 2d 1302; *Friedman v. N.Y.,* 18 L. Ed. 2d 1303; *Ratner v. Calif.,* 18 L. Ed. 2d 1304; *Cobert v. N.Y.,* 18 L. Ed. 2d 1305; *Shepherd v. N.Y., Lewis v. N.Y., Bloomberg v. N.Y.,* 18 L. Ed. 2d 1306; *Avansino v. N.Y., Cessa v. N.Y., Strombelline v. N.Y., Gaggi v. N.Y., Costanza v. N.Y.,* 18 L. Ed. 2d 1308; *Aday v. U.S.,* 18 L. Ed. 2d 1309; *Corinth Publications, Inc. v. Wesberry,* 18 L. Ed. 2d 1310; *Books, Inc. v. U.S.,* 18 L. Ed. 2d 1311;

Rosenbloom v. Va., 18 L. Ed. 2d 1312; *A Quantity of Books v. Kansas,* 18 L. Ed. 2d 1314; *Mazes v. Ohio,* 18 L. Ed. 2d 1315; *Shackman v. Calif.,* 18 L. Ed. 2d 1316; *Landau v. Fording,* 18 L. Ed. 2d 1317; *Wenzler v. Pitchess,* 18 L. Ed. 2d 1351. The community standards of 11 states were drawn in issue. In every one of these 26 cases, the state and federal courts had held the subject matter to be obscene, and on appeal, the Appellate Courts had agreed. In eight of these cases, the determinations were made by jurors, chosen from the communities involved. In 11 of these cases the state courts (California, New York and Kansas) had used a hard-core pornography test in affirming the matter on appeal as being obscene. Yet this Court saw fit to reverse 22 of these without any plausible explanation.

The type of materials brought before the High Court in these cases was uniform. There were 20 sex paperback books, their titles were: "Sex Life of a Cop", "Lust School", "Lust Web", "Sin Servant", "Lust Pool," "Shame Agent", "Lust Job", "Sin Whisper", "Orgy House", "Sin Hooked", "Bayou Sinner", "Lust Hungry", "Shame Shop", "Flesh Pots", "Sinners Seance", "Passion Priestess", "Penthouse Pagans", "Shame Market", "Sin Warden" and "Flesh Avenger"; 12 bondage books, several hundred photographs of nude females in provocative poses with focus on the pubic area and suggested invitations to sexual relations; 8 motion picture films of the strip-tease type, 10 girlie magazines, one nudist magazine, and two home-made so-called "underground" film. Nowhere could it be claimed that art was involved, unless one might look to the two "underground" films—and strangely enough, neither of those were cleared by this Court.

It would serve no purpose to review the entire subject matter there involved. We question however, inasmuch as no written opinions were rendered, if this Court is aware of the total impact of its decisions as for example in *Shackman v. Calif.*, giving this Court's approval to the 8 mm. and 16 mm. films, "O-7" and "O-12". The Court will recall the nature of those films from the description of Judge Hauk in his opinion in *Shackman v. Arnebergh,* 58 F. Supp. 983, 991:

> "The film 0-12 . . . was viewed by the court. The film consists of a female model clothed in a white blouse opened in front, a half-bra which exposes the upper half of the breasts including the nipples and a pair of white capri pants (which are soon discarded) under which the model wears a pair of sheer panties through which the pubic hair and region are clearly visible. The film consists of the model moving and undulating upon a bed, moving her hands, and lips and torso, all clearly indicative of engaging in sexual activity, including simulated intercourse and invitations to engage in intercourse. There is no music, sound, story line or dancing other than exaggerated body movements. On at least three occasions, the female by lip articulation is observed to state, 'fuck you', 'fuck me'.
>
> "The film 0-7 is virtually the same as Exhibit 1. The model wears a garter belt and sheer transparent panties through which the pubic hair and external parts of the genitalia are clearly visible. For at least the last one-half of the film, the breasts are completely exposed. At one time the model pulls her panties down so that the pubic

> hair is exposed to view. Again, the focus of the camera is emphasized on the pubic and rectal region and the model continuously uses her tongue and mouth to simulate a desire for, or enjoyment of, acts of a sexual nature . . ."

Does this Court know that such films are now appearing in bars to supplement the topless fare, and on the large screens in neighborhood movies? Eight-15 minute reels constitute a two hour fare! They are quick to advertise that such have the imprimatur of this Court.

Previously this Court had relied upon "redeeming social importance" to establish its jurisdiction in such matters. There was no claim made in these cases, however, that any such element existed, nor does amicus feel that such could honestly be claimed. If the constitution guarantees to the people the right to have questions of fact determined by juries, and we have always thought that it did, there is a serious question whether this Court has not overstepped the limits of its jurisdiction.

Although the *Redrup-Austin-Gent* opinion was a "no-clear" majority decision and added nothing to the prior decisions of this Court, its rationale was the only reasoning offered to govern the entire 26 decisions. Justices Black and Douglas restated their position that a state could not suppress obscene writings, Stewart held to the view that only hard-core pornography could be proscribed, Brennan, Fortas and Warren adhered to their views that there were three independent tests which must "coalesce", and Justice White retained his view that the social value test was not an independent factor. It is becoming increasingly

apparent, in our opinion that the members of this Court are making "private" and not "'Constitutional" judgments.

The Court in its opinion did not discuss the nature of the materials or the circumstances surrounding their dissemination. Nor did the Court report the evidentiary facts presented in the record in each case and, as stated before, the Court did not point to any item of redeeming social importance.

Not only were the majority of 7 not in agreement on the rationale of *Redrup-Austin-Gent,* but they were also in disagreement in the application of the divergent tests to specific materials, the voting in the individual cases ranging from 8-1 and 5-4 in one direction to 5-4 in the other direction.

Even those Justices who were in agreement as to the test to be applied on review, did not arrive at the same result in their personal application of that test. Presumably Justices Warren, Fortas and Brennan were in agreement that the three "separate" tests must "coalesce". Yet in the girlie strip-tease film cases, Justice Fortas thought the films not obscene, whereas Justices Brennan and Warren thought otherwise; in the girlie photo cases, Justices Brennan and Fortas thought them not obscene, whereas Justice Warren thought overwise; in the paperback book cases. Justice Warren voted to set them for argument, whereas Justices Fortas and Brennan voted for reversal, except that in the paperback "publisher" case involving "Sex Life of a Cop", Justices Warren and Brennan voted to remand for reconsideration as to the test involved, whereas Fortas voted for reversal on the grounds that it was not obscene. How this latter decision can be reconciled with the *Ginzburg* decision and opinion is difficult to comprehend.

The individual judgments of the separate justices were not consistent. Justice Brennan, who thought the girlie strip-tease movies to be obscene, was of the opinion that still photos of the same type of action, *i.e.*, photos focussing on the vagina or backside, suggesting invitations to intercourse or sodomy, were not obscene. Yet, in *Fried v. New York,* cert. denied 378 U.S. 578 (June 22, 1964), the defendant served 60 days for the same material. In *Kingsley Books, Inc. v. Brown,* Justice Brennan strongly urged that a jury make the determination, yet in these cases he overruled what clearly appeared to be jury matters. Chief Justice Warren, who thought the materials in *Roth, Ginzburg* and *Mishkin* were obscene, in considering the same type of materials in *Austin, Keney, Redrup, Gent* and *Friedman,* could not see any similarity. Justice Warren, who castigated the Attorney General of Kansas in 1964 for employing the injunctive device and exorted him to prosecute criminally, voted to reverse criminal convictions in *Redrup, Austin, Keney,* and *Friedman.* In *Jacobellis v. Ohio,* 378 U.S. 184 (June 22, 1964), Chief Justice Warren said community standards meant "local" community standards, and the communities throughout the United States were "diversified" and that the Supreme Court should respect the lower's court's determination, yet he ignored jury verdicts in *Austin, Keney, Gent and Aday.* In the *Mishkin* case in 1966, six justices voted to affirm, yet in *Friedman v. N.Y.,* dealing with almost identical subject matter (sadistic and masochistic material) five of those six justices voted to reverse.

While the Court voted the underground film "Un Chant D'Amour" obscene 5-4, that same majority of five was unable to get together on a lower grade film

"Flaming Creatures" which depicted a 7-minute rape scene, acts of oral intercourse, fondling of the female vagina and breasts, masturbation of the visible penis and the like, some of which were suggested but never shown in the film "Un Chant D'Amour." The Court avoided a decision in that matter by holding the issues "moot."

We have searched without success for the answers to explain why this Court took such a radical turn, when a solution to the problem, worked out in Ginzburg and Mishkin, appeared in sight.

If the appearance of New York Penal Law Section 484(h) on the horizon was a significant factor, then this Court must recognize, as is commonly known to law enforcement, that in looking at the minor's statute it is looking at a mirage, in so far as effective enforcement of the law is concerned.

Assuming such a statute is available to the communities, can such a law be enforced? The answer is obvious—no. If an inquiry were made of the Rhode Island jurisdiction or of any other state having such a law, it would be made known that the number of cases filed under that statute would be close to zero. As an example, after the June 22, 1964 decision in *Jacobellis v. Ohio,* the Los Angeles County District Attorney's office contacted the Juvenile Division of the County Sheriff's Department with the thought of working out a test case on Penal Code Section 311.3 (Sale to Minors) based upon the advice of Justice Brennan in the *Jacobellis* case. The Sheriff's Office was reluctant to make use of minors as working operators, it being against their policy because of the "contributing to de-

linquency" aspect. After some discussion, it was decided that such a test was proper, if the parents of the minors consented to their use as operators, and if close surveillance was made of the operators by law enforcement. All Sheriff's stations were alerted to look for reported violations of sale to minors, so that a test case could be undertaken. In the six month period between July and December, 1964, no sales were reported.

The above points out one of the weakness of the statute. Who is to enforce it? Suppose "A" violates the statute and sells to minor "B", who is to report the violation? Certainly not "A", the violator, nor "B", the victim. If "B" is caught with the material by his parents or his school principal, what are the chances that "A's" identity will be learned. More than likely "B" will adopt a cover-up story to conceal "A's" identity. Today, nobody wants to be classed as a "fink." The case of Richard Lance Corey in *Ginsberg v. N. Y.*, is the exception. Even if "B" is willing to reveal "A's" identity to his parents or school supervisors, what parent is going to the police to volunteer his or her child as a prosecuting witness, and lay the family open to adverse publicity? It would be a super-parent who would offer his offspring to act as the watch dog for the community in this problem area. Once again, Mrs. Mary Corey is an exception on the modern scene.

Assuming the complaint were filed, the further issues of "Who made the sale?," and "Did the seller know the victim's age?" would still be questions of fact for the jury, the resolution of which would depend upon how convincing a story was told by the minor "B" in identifying "A", and in "A's" denying having made the sale and knowledge of "B's" age.

If the argument is made that the mere existence of such a statute would be a deterrent, in that sellers would watch their sales so as not to bring themselves into violation the answer is, that it has not proven so, where in use. And as noted by defense counsel, what is to prevent an adult from making the purchase and passing it on? Certainly it is recognized that a purchaser rarely burns the material after reading the same. For example—an actual case—an adult dropped cut-outs from nudist magazine in front of three girls at a high school and told the girls to pick the pictures up. It is standard operating procedure for such materials to be purposely dropped on the school grounds and in church and neighborhood areas.

If this Court were to indicate that the minor's statute should be the principal approach to the problem, it would, thereby, guarantee immunity to the publisher who will place a "For Adults Only" sign on the material. Whereas formerly, and as expressed in the model penal code case comments (Reporter's Comments to 1957 draft, at page 13), the purpose of the obscenity statutes is to get at the producers aand circulators, the operation of the minor's statute is to effect the contrary.

There is a difference in the effectiveness of a minor's statute regulating the distribution of publications, and a classification ordinance which regulates the exhibition of a motion picture film. Unlike the solution offered in *Interstate Circuit Inc. v. City of Dallas,* No. 56, appeal filed March 3, 1967, and *United Artists Corporation v. City of Dallas,* No. 64, appeal filed March 16, 1967; and jurisdiction noted, 18 L. Ed. 2d 620 (May 15, 1967), which acts to limit the exposure

by totally eliminating a segment of the audience which may see the subject matter, there is no similar degree of control in the administration of minor's statutes like section 484(h), regulating the distribution of publications. In order to apply the latter regulation it is necessary to enforce the restriction as to each seller, and the successful application in one case, as noted above, will have little effect on other distributions to minors. The affirmation of Ginsberg's conviction will not significantly deter future distributions to minors.

Particularly does this minor's problem become more acute since this Court, by its decisions in the 1966 Term, has opened the sluice gates on a new deluge of pornography. It is reported that in a period of five months, a total of two million copies of 24 titles of Collector's Publications, similar to those enclosed, were distributed nationwide by that one publisher. It is reported that he has a total of 300 of such titles on his drawing board. To say that Section 484(h) can effectively prevent the volume of these materials (which are floating around as a result of this Court's ruling in the *Fanny Hill* case and the reversals during the 1966 term) from reaching the wrong audience is an unrealistic dream.

The Miscellaneous case histories synopsized in Appendix B are surely some evidence that the May 8, 1967 and June 12, 1967 decisions were ill advised. The parents of the 12-year old girl who was raped on the city streets by a 20-year old boy with a girlie magazine in his hip pocket will not understand this Court's decision which reversed the state rulings which sought to control the girlie magazine problem. The parents of seven teen-agers who sexually attacked a 12-year old girl, will

not be able to understand the logic of this Court's actions which have neutralized state efforts to control the runaway distribution of subject matter which instructs, in enticing terms, that perversion is acceptable—material which the youths themselves indicated was their primer of instruction for the sexual crimes they committed. The parents of a 19-year old girl who was raped and murdered by a youth who forcedly entered her car at an intersection in the afternoon, after spending the morning watching lewd motion picture films, will be unable to accept a Court's determination which holds such films to be constitutionally protected against the contrary demands of the state governments.

More and more, district attorneys like Bergna and Booth are noting that there is more of this type of thing than we suspect.

Conclusion.

We recognize that vice and pornography are not new to the scene. Such is but a recurrence in the cycle of history and the nature of man. Yet—we would point to the moral problems this nation faces, and recommend the wise counsel of Alexander Pope, speaking in his essay on The Monster Vice in 1705, of the same battle being waged in that century:

"Vice is a monster of so frightful mein,
As to be hated, only needed to be seen,
Yet seen to oft, familiar with her face,
We first endure, then pity, then embrace."

The evidence is all around us that this Nation in 1967 has embraced the monster vice. Those statistics are known. Since 1957 the juvenile delinquency cases

have almost doubled to more than 1.1 million in 1965. Between 1960 and 1966, juvenile arrests for homicide went up 31.3%, rape 34%, robbery 55% and aggravated assault 115%—many of the latter offenses involving brutal and wanton beatings of helpless persons. During this period of time, American aged 10 to 15 increased by less than 20%. U.S. News & World Report, Oct. 9, 1967, page 74. The spiralling climb of illegitimate births is told in these figures: In 1950 about 1 out of 25 children born in the United States was illegitimate. By 1960 the figure was one out of 19, by 1965 it was one out of 15 American births. If trends continue at the recent rate, at some time in the 1970's one out of every 10 American babies will be born out of wedlock. Already in some major cities, far more than 10% of new babies are illegitimate. U.S. News & World Report, Oct. 2, 1967, page 84. *It was in this setting that the United States Supreme Court wrote its decisions during the 1966 Term. We reiterate our opinion that the 1966 Term cases were wrongly decided.*

We think this Court should alter its course and reestablish the norms which existed at the end of the 1965 October Term—immediately after the decisions in the *Ginzburg* and *Mishkin* cases.

Sam Ginsberg v. New York should be affirmed but only upon the reasoning in the past opinions of Judge Learned Hand (*i.e.*, that the minors situation is but one application of the overall obscenity control mechanism.) And through acknowledgment of Justice Harlan's views regarding the jurisdiction of this Court.

This Court cannot escape the judgment that "the domain of sexual morality is preeminently a matter of

state concern," and "the Court should be slow to interfere with state legislation calculated to protect that morality" . . . Justice John Marshall Harlan, concurring specially in *Alberts v. California.*

Respectfully submitted,

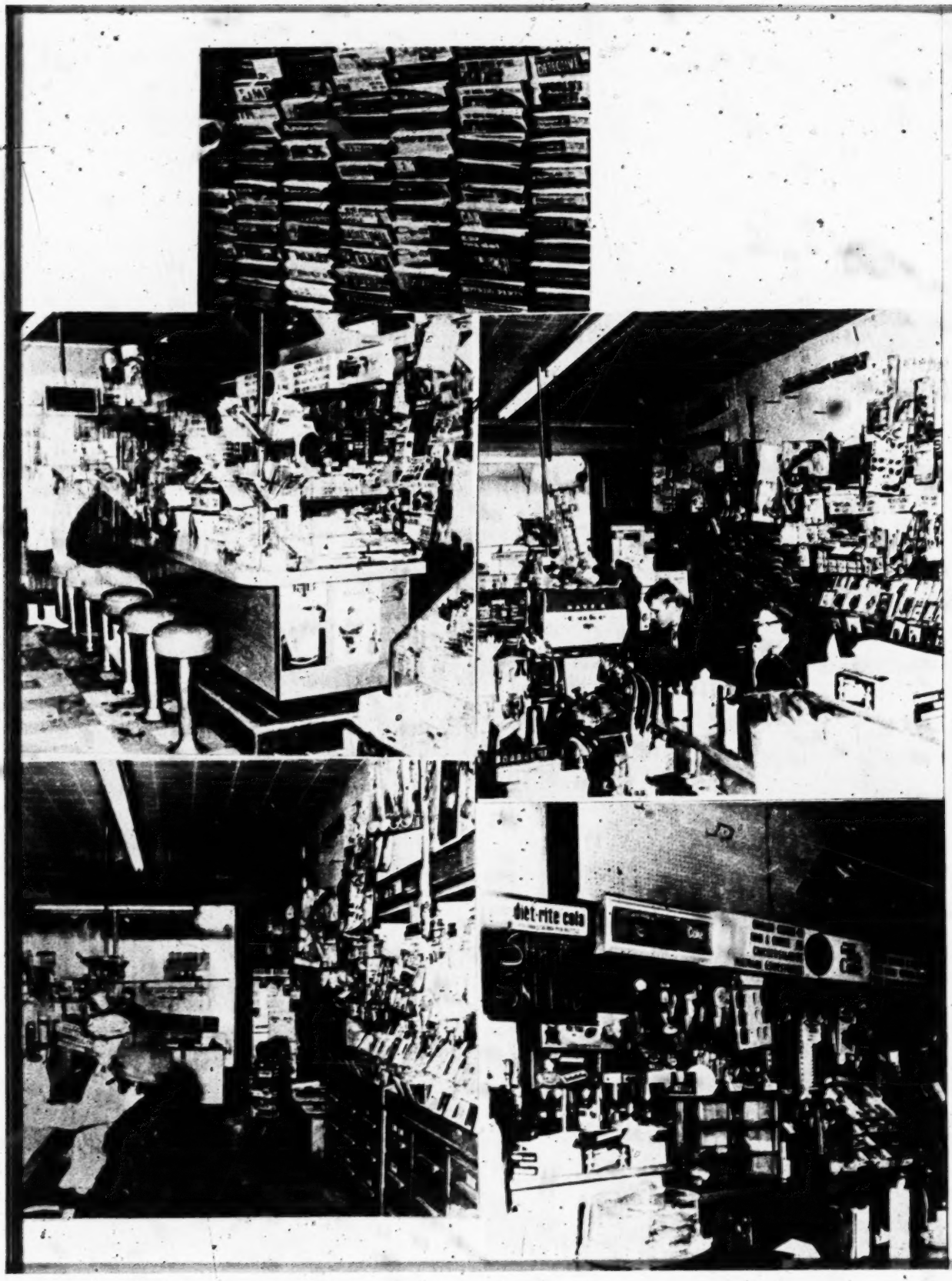
CHARLES H. KEATING, JR.,
JAMES J. CLANCY,
RAY T. DREHER,
Counsel for Amicus Curiae.

HOW MANY HOMO COLLEGE MENT FROM OUR OWN SEX SURVEY
SIR!
SPEED, SEX AND DESTRUCTION
THE MOB WENT WILD
ENCORE FOR SIRMATES
THE BEATNIK BOOK TO END 'EM ALL

mr. ANNUAL
WIFE SWAPPING IN THE SOCIAL SECURITY SET
AMERICAN BREAKTHROUGH
ANATOMY AND DECOR OF THE FEMALE LEG
SEX LIFE OF AN UNMARRIED WOMAN
WHAT THEY DON'T TELL YOU ABOUT TOKYO
CONFESSIONS OF A VOYEUR
JEANNE BLACKBURN
DARTLAND DELROY

ESCAPADE
those who need convincing
Born free on Bornholm
Escapade visits Rutgers University
Orgy on a Paris stage

BIRTH CONTROL METHODS FOR MALES
man to man
AN INTERVIEW IN DEPTH
MAMIE VAN DOREN
Talks of Love and Men
EXCLUSIVE SEX SURVEY
U.S. SINGLE GIRLS
FICTION
"The Sun Was Gone"
JOHN STEINBECK
on "Death and Insurance"
VIET NAM—
THE UGLY WAR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APPENDIX "B."

Miscellaneous Cases From News Accounts and Other Sources.

1. *Murder—Sexual Perversion.* Male, aged 27, and female, aged 23, murder a girl, aged 10, and boys, ages 12 and 17. Prior to their death murderers employed torture and sexual perversion and tape recorded the events. Lewd photographs of young girls in pornographic poses and a library of pornographic and sadistic literature (DeSade) were found in the male's possession. See Ian Brady/Myra Hingley Moors case. December 9, 1965, and Lady Snow's book, "On Iniquity" by Scribner, discussing this famous Moors case.

2. *Rape—Murder Case.* Two male youths spend the morning and early afternoon drinking alcoholic beverage and watching lewd motion picture films. At about 3:30 P.M. one youth forcibly enters a car driven by a 19-year-old girl, when it was stopped for a traffic light, forcing her to drive him to a secluded area where he killed her after trying to rape her. See Doss case, Freehold, N.J., Nov. 1, 1966.

3. *Rape Case.* Seven Oklahoma teenage male youths gang attack a 15-year old female from Texas, raping her and forcing her to commit unnatural acts with them. Four of the youths, two the sons of attorneys, admit being incited to commit the act by reading obscene magazines and looking at lewd photographs. See Fellers case, Oklahoma City, Feb. 1, 1966.

4. *Rape—Murder Case.* Male, aged 16, is identified by a 59-year old female victim as the person who criminally attacked her in her home. Youth admits to having read an account of a criminal assault in a

magazine in a neighborhood store after which he walked around the neighborhood, passed the victim's house and decided to break in. The victim told detectives that she pleaded with the man, "I'm an old woman and I don't have any money." She said he replied that he did not want money. The intruder then dragged her into the bedroom and ripped off her clothes. See McGowan case, Akron, Ohio, Nov. 19, 1966.

5. *Assault.* Male youth, aged 13, admits attack on a young girl in a downtown office was stimulated by sexual arousal from a Stag magazine article he had previously read in a public drugstore, which showed naked women and an article on "How to Strip a Woman". See affidavit of youth, dated June 30, 1965.

6. *Rape—Juvenile Delinquency.* Investigating the case of a 16-year old youth who raped a 10-year old girl, police found in his possession three homosexual playing cards. A number of these cards were found in possession of other boys of that neighborhood, ranging in age from 13 to 16. See Report of Capt. G. E. Matheny, Juv. Off., San Antonio, Texas, Police.

7. *Attempted Rape—Juvenile Delinquency.* A 15-year old boy grabbed a 9-year old girl, dragged her into the brush and was ripping off her clothes. The girl screamed and the youth fled. The next day he was picked up by police. He admitted that he had done the same thing in Houston, Galveston, and now in San Antonio. He said that his father kept pornographic pictures in his top dresser drawer and that each time he pored over them the urge would come over him. See Report of Capt. G. E. Matheny, Juv. Off., San Antonio, Texas, Police.

8. *Rape Case.* Woman is raped on the way to church one morning. Just prior to the attack the man was reading obscenity in his panel truck. Cleveland, Ohio. See County Prosecutor Corrigan's story in Universe Bulletin, April 14, 1967.

9. *Rape Case.* Santa Clara County District Attorney Louis Borgna reports, as printed in San Jose, California, Mercury, Nov. 23, 1966:

> "Santa Clara County Crime File documents cases where teenage boys have attacked, and killed, women after their sex drives were ignited by lewd photos from readily available men's magazines. One youth after seeing a beautiful young girl kidnapped and held prisoner in the British movie, The Collector, carted off a girl and held her for 18 hours while he forced her to commit every act you can possibly imagine. In his home we found nothing but this type of magazine. . . . The adult bookstores are loaded with books on sadism and masochism—sexual satisfaction through the infliction or receiving of pain." Showing the thin book, he said it contained photos of women tied up or being beaten up by other woman and it sells for $5.20. "In Santa Clara County we used to think these things were academic," Bergna said, "but a year or so ago police discovered in Sunnyvale a torture chamber where a young professional man beat other men and committed unnatural sex acts. We just completed another case in the Gilroy area in which a young sailor was bound and beaten by another man bent on fulfilling his sexual hunger. *It just might be we have more of this type of thing in this country that we suspect.*" (Our emphasis.)

10. *Murder Case.* Male youth, aged 14, admits slaying of 9-year old girl. Body was found in a junk-filled shed which was used as a neighborhood playhouse. Among the articles removed from the shed were some magazines of a pornographic nature. See Lang case, Denver, Colo., June 30, 1966.

11. *Murder Case.* A sackful of pornographic magazines were found near a waterfilled ditch where the bodies of two strangled girls, aged 5 and 6, were discovered. See Tift/Reynolds (victims) case, Cannock Chase, England, Jan. 15, 1966.

12. *Kidnap Case.* Seven-year old female kidnapped by 22-year old parolee with two previous molesting convictions. Victim was photographed in the nude and was squirted in the eyes with tear gas to prevent identification. Nudist magazines were found in the car and at his home. See Adkins case (victim), Cleveland, Ohio, January 1965.

13. *Juvenile Delinquency—Sex Gang.* A juvenile sex gang involving boys 7 to 15, plus one 3-year old, was discovered in Oklahoma. An attorney representing one of the 15-year old boys revealed the boy told him they and sub-teenage youngsters had bought magazines at various grocers and drugstore newsstands and were incited by pictures of men committing unnatural acts and men and women in lewd photos. See Wilson case, Valley Brook, Oklahoma, Jan. 27, 1966.

14-16. *Juvenile Delinquency—Sex Perversion.* Male, aged 42, uses lewd photographs of males and money to entice other male youths to pose for photographs and participate in lewd acts. San Leandro, Calif. case, July 21, 1967; Welty case, Portage, Mich., Mar. 21, 1965; and Gardiner case, Parkland, Md., Mar. 31, 1965.

17. *Juvenile Delinquency—Sex Perversion.* An interested person discloses conversation with teenage member of gang who revealed that teenage gangs indulging in acts of perversion were using Playboy to get them excited. See letter of Sept. 8, 1965.

18. *Juvenile Delinquency—Child Molestation.* Two girls, aged 9 and 12, told police that the male owner of a bookshop, aged 58, located next to a high school had shown them photographs of naked men and women and had abused one of them. Police indicated that the bookstore owner had previsouly spent two years in jail for molesting a girl 10 years old. When arrested police found thousands of obscene magazines and books in the shop. See Cohn case, New York, N.Y., 1965.

19. *Juvenile Delinquency—Child Molestation.* A male individual brings two girls, aged 13 and 15, into his home which is filled with obscene literature and has relations with them. Cleveland, Ohio. See County Prosecutor Corrigan's story in Universe Bulletin, April 14, 1967.

20. *Juvenile Delinquency—Child Molestation.* The Journal of Atlanta, Ga., of Jun. 6, 1966, reports "A psychiatrist examining a man charged with molesting a 10-year old girl in Fulton County last year reports: 'He states he would often buy . . . . books which were illustrated by pictures of women wearing varying amounts of clothing assuming suggestive positions . . .'"

21. *Juvenile Delinquency—Child Molestation.* First Ass't. States Attorney Edward M. Booth, Jacksonville, Fla., writes in his letter of May 27, 1966, . . . "we have four felony charges pending in our criminal courts at this time wherein adults are charged with various sexual offenses involving minor Children. In

each of these four cases, we have found that obscene literature and other pornographic materials were used to entice minor children ranging in age from 8 to 16 years, including both boys and girls, into indulging in various lewd and lascivious sexual acts with the adults involved. . . . I have found that most cases involving sexual activities with minor children have obscene and pornographic literature and materials involved, and, *perhaps, this is true throughout the country . . .*" (Our emphasis.)

22. *Sex Perversion—Juvenile Delinquency.* Defendant male, 28, invited boys, 13 and 15, to a house in Brentwood where they swam, watched TV, were served vodka and 7-Up, and shown "Playboy" magazines. Defendant engaged in an act of oral copulation. See People v. Cramer, 60 Cal. Rptr. 230, 231, where the California Supreme Court held evidence of one such act was admissible in prosecution for a second offense as evidence of a "common design, plan or modus operandi", reversing a lower appellate court holding to the contrary in 55 Cal. Rptr. 701.

23. *Juvenile Delinquency—Sex Perversion.* A 5-year old boy was the victim of sodomy by a 15-year old boy. The youth arrested said he had seen a number of these homosexual playing cards and had heard men and older boys talk about such acts. He admitted committing these acts on several small boys.

24. *Juvenile Delinquency.* A 17-year old youth was picked up for writing an obscene and suggestive letter to a 14-year old girl. The youth took the officer to the neighborhood drugstore and showed him the books he had been reading—"Vengeful Virgin", "Sex Appeal", "How to Make Love", all available at 35¢ to a

dollar on numerous newsstands. See Report of Capt. G. E. Matheny, Juv. Off. San Antonio, Texas, Police.

25. *Juvenile Delinquency.* A 14-year old boy on the north side was arrested for making obscene telephone calls. He admitted that he had called over 200 women and girls. He had in his home a huge manila envelope stuffed with filthy pictures. These he had traced from pictures in such magazines as "Sun Bathing", "Nudist", etc., because he had looked them over many times but did not have the money to buy them. He further admitted that while talking to the women he had the urge to hurt them. See Report of Capt. G. E. Matheny, Juv. Off. San Antonio, Texas, Police.

26. *Juvenile Delinquency.* Police picked up a 15-year old boy, who had written an extremely obscene and suggestive letter to a 13-year old girl, asking her to meet him near a northside elementary school. When arrested he had in his possession a deck of playing cards adorned with pictures of nude women. See report of Capt. G. E. Matheny, Juv. Off. San Antonio, Texas, Police.

Cases Derived From CDL Interviews With Police Officers in a City of 100,000.

1. *Rape.* Male youth, age, 20, forcibly attacks minor female age 12, on her way home from school. The victim reports (and the police find) a girlie magazine belonging to suspect left at the scene of the attack. See James case, April 3, 1963.

2. *Newspaper Route (1963—no arrest).* "We had a newspaper delivery route man. He ad a whole boxfull of lewd photos. He would show these to the little newspaper boys and then make a pass at them. There

wasn't enough evidence to go on him. His M. O. was to show these pictures to get the kids excited and then make a play for them. As I recall, we had two complaints on him, but we couldn't make him. He admitted to having the pictures but there wasn't the evidence to prove he showed or fondled them. Even though the boys said he showed them—their ages were such that they wouldn't go on him."

3. *Girlie Cutouts (1962—no arrest).* "One case comes to my mind and believe it or not, he was never caught. He was shook down on a couple of occasions, and he had these girlie magazines in his possession in the car. He had pieces of string tied around the wrist and cut them out and things like that. He had them cut in several places; and he had a penis inserted into one. He was in one of the market parking lots at the time. I brought him in and talked to him. He admitted that this was his doings. For a long time I had his name available. I always thought that he was involved or was going to be involved."

The magazines are in the police files. They are all of 1962 manufacture: Figure Annual 1962, Cuddle Bug, Vol. 300, No. 1, Black Lace 1962, Orbit L. N. Flirt, Vol. 1, No. 2. In each of the photographs the individual had cut slits in the vaginal and anal area and inserted human hair. It is interesting to note that this occurred just before the nudist magazines, showing pubic hair, came into being.

4. *Sex Perversion.* "We had a child molestation. The fellow was a projectionist. He would show lewd film and at the same time he was playing with these 5 and 6-year old girls. He copped out to the whole thing, but I lost it in court. The officer who was with

me didn't turn on the tape recorder. The defendant got up in court and denied the whole thing. About 5 years later his wife came in in tears. She found out that he was doing the same thing to his little nieces. He had told the whole thing to her, but she had gotten up in court and lied."

5. *Re: Lewd Telephone Calls:* "A guy will call up and say, 'I'm looking at some pictures, and I'm sure you look like this.' To take one case and say this happened in that case would not be possible."

6. *Re: Indecent Exposure and Peeping Toms.* "I do know that there have been occasions when we have had prowlers—peepers—they would have magazines in their cars and would frankly admit they were looking for excitement." The biggest thing we would have would be indecent exposure—then you would have your prowlers which could be broken down into two classes. I found the same thing with them. They had nude pictures and the magazines. It wasn't an uncommon thing and still it didn't happen each time. You thought not too much of it if they were there or they weren't there. There were numerous occasions you would find when you talked to them they had girlie magazines or photographs in their car."

7. *Indecent exposure.* "Two girls walked down a sidewalk near the suspect's place of business (commercial). He whistled at them. They looked up to see him standing inside the door. His fly was open and his privates were out with one hand on his privates and one beckoning to the girls. Defendant had pictures cut out of a nudist magazine, showing nude women in various poses, pinned up on a bulletin board. One of the victims saw the defendant remove

the photos as they were leaving. The children notified their parents who called the police. When the police arrived (20 minutes later) the pictures were no longer visible but were found by the police among some newspapers."

8. *Exhibiting Girlie Magazine Cutouts. (1966—no arrest).* "Two or three young girls, 12 and 13, were walking from school on the sidewalk. They observed a vehicle pull up into the driveway a short distance from them and in their path. A male exited from the vehicle and placed something on the sidewalk. He pulled out of the driveway and went down the street a short way. Upon reaching the spot the girls observed the subject matter to be nude pictures. They took them up to their mother who destroyed the pictures before reporting the case."

9. *Child Molestation.* "He had these lewd pictures at the Recreation Center. Some kid walked by and he conned him into coming into the bushes and forced him to masturbate. It was reported by the victim. This was the earlier case. At that time the suspect was about 13. Victim was also a young boy. In the more recent case (infra), it was a kidnap and oral copulation."

10. *Sex Perversion.* "A 50-year old man and an 8 and 11-year old girl were involved. The girls reported to the parents who reported to the police. The defendant came over with some lewd pictures and showed them to the girls. He worked for the family. He showed the pictures, had them pull down their pants and then they played games—ball in the pants, etc. He eventually committed 288 (oral copulation) on the children at their home."

11. *Exhibition Obscene Photos.* "A woman with a Youth Employment Agency had a daughter doing amateur modeling at a restaurant. The daughter passed by the suspect who stopped her and displayed a nude photograph and asked the daughter if this wasn't a picture of her. Another person was offered a drink and shown the same nude photograph."

12. *Sexual Perversion.* "A homosexual reported being assaulted with a deadly weapon. The event occurred on graduation night in June. Two boys were involved. One had worked in a restaurant where the suspect worked. The boys came over to his residence. The suspect had promised to take them to Disneyland to the graduation party but reneged. He gave them alcohol and showed them films. They boys had quite a bit to drink, got sleepy and went into the bedroom and he engaged in oral copulation. The boys cut off his hair and took the film. It was submitted but no complaint was filed. There was conflicting evidence —one of the boys might have been a homosexual."

13. *Exhibiting Obscene Photos.* "In the homosexual bars they show movies on the wall—male nudist type."

14. *Sex Perversion.* "A 17-year old boy had access to a vehicle. He picked up a 5-year and 7-year old boy and, after showing them a cutout from a nudist magazine behind a building, took them to a park. He copulated the 5-year old boy and forced the 7-year old boy to copulate him. He took them near their home. His record shows he had used a knife. He had a prior—he was excluded from Hawaii on the same activity."

15. *Sex Perversion.* "It was more than 10 years ago. Suspect lived alone. He got himself made Scout Master of the Sea Scouts and took young boys to his hotel. He would talk to them, then give them something to read. In the book it would say, 'Is this making you excited, are you getting a ....? Do you want me to ....?' He had all kinds of pictures of lewd acts, homosexual acts, etc. He was given psychiatric treatment."

16. *Sex Perversion—Suicide.* "The body was discovered by the wife of the suspect, who is 24 years old, when she came home from work as a social worker. He attended law school. She found him lying on the bed in a supine position, face down and naked. On top one end of a rope was tied to his ankles, and the other end was around his throat. A pair of white sox kept the rope from connection with his skin as did a towel around his throat. She screamed and the neighbor came in and cut the ropes. The Fire Department tried resuscitation and called the police. When the police arrived, his ankles were still trussed but rigor mortis had set in. Just above him on the bed were 5 or 6 nudist magazines (2 were Sun and Sport), all open to female forms. When he was moved, it was found he had a contraceptive on and had an emission on the bed. All windows, doors were locked. The neighbors had seen him enter, and he had no visitors until his wife came home. In the investigation with the Coroner's Office and County Sheriff disclosed a type of masochism—in which sexual excitement is reached upon tying oneself up and hanging to almost a point of blackout—substantiated by psychiatry and case histories. Interrogation of suspect's wife revealed that

ever since their marriage he was unable to obtain satisfactory intercourse without the use of ropes, being tied up and subjected to this before he could perform satisfactorily. He had received psychiatric help for 8 years. The death was accidental—he did not intend to do it. In this County, cases of this type occur about 6 times a year in which the defendant goes too far. He had sox on and a towel on his throat to prevent rope marks."

17. *Sex Perversion—Juvenile Delinquency.* "The defendant showed the victims pictures—nudist magazines and nude girls until he got them involved and participating in homosexual activity. He started with pictures of nude women and men and then afterwards just nude males. The story of the use of nudist magazines came from the two boys and other victims. The boys were in the 11, 12 and 14 age group. I came up with 14 victims myself and know there were many others. These were just those who admitted relationships with him and the ones I could identify. In each case the parents were surprised. He was active in the church choir. The boys called him Uncle Harry. The kids used his place as a hangout. They had young girls come over but defendant had nothing to do with them."

18. *Voyeurism.* "One time we got a call from the swim park. A man was seated in a car looking at the girls with binoculars. It was suspicious to the ticket woman who called the police. When we drove up he was driving away. He admitted to the M.O. but we let him go since nobody had seen him expose himself. He had a big jar of vaseline and would masturbate while watching the girls. He had several female type

hard type backs, pornographic books. Some fly-by-night was producing the material. They were the hard-back novel that you could buy in your magazine stores downtown."

19. *Sex Perversion.* "On one investigation we found a dress dummy in a garage with a hole cut in it. Evidently they would dress the dummy and use it for intercourse. We found a whole mess of girlie magazines at the same time in the garage."

Re: M.O. Card File. The City maintains a M.O. card file that goes back 5 years. The following M. O.'s were found under the general title "Sex Crimes."

20. Suspect told the young boy, "Come up to my room and look at some of the magazines." The juvenile reported the matter to the police who searched the room and found one book and two magazines.

21. The suspect "shows pictures of nudes".

22. A 21-year old female reported receiving lewd photographs in the mail. She believed that a 24-year old male whom she had stopped seeing had sent the materials out of spite.

23. An automobile drove up to the driveway of a home and left photographs of a penis on the driveway. The victims are believed to be two minors, ages 10 and 12, living in the residence.

24. A man in a car left nude pictures on the sidewalk.

25. A male approached a 9-year old juvenile in the public restroom saying, "See this" and "Have you ever seen your mother in the nude?" and shows black and white photographs of nudes.

Cases Derived From CDL Interviews With Police Officers in a City of 65,000.

1. *Sex Perversion.* Officer in investigating at about 5:40 P.M. came upon two youths, 15 and 16 years of age, engaged in an act of sodomy. The officer stated. "At the time I came upon these kids, there was a Playboy magazine opened to a double-paged spread of nude female photos. The boy that was acting as the passive partner had his head propped up, with his hands resting on his elbows with the magazine spread out before him. The active partner while on top was looking at the same magazine over his friend's shoulder. One of the youths had taken the magazine from the drawer of his older brother's dresser, and both had been reading it prior to the act."

2. *Indecent Exposure.* Informant, parked at a chain store parking lot, was waiting for his wife and noticed the suspect in a vehicle who was looking at the women as they passed and appeared to be masturbating. He called a police officer. "As the officer approached suspect he was observed holding and apparently reading a pocket book 'All About Annette' (Sex Stories Pocketbook). As the suspect turned toward the officer a black suit coat was observed lying on the suspect's legs, the fly to suspect's trousers was unzipped, partially exposing the suspect's penis. The suspect had another sex pocketbook lying on the front seat, 'As Bad as They Come', which he grabbed and attempted to put underneath the front seat of the described vehicle. . . . Suspect admitted he was masturbating while he was watching the women that were wearing shorts walking through the parking lot and into the chain store at that location. He also stated

that he had been reading the sex pocketbooks as this occurred and that this would 'excite him'."

3. *Indecent Exposure.* A male 36 exposed himself on 7 different occasions in a 2-day period to girls 8 to 12 in the vicinity of a school and a playground area. On one occasion the following occurred: "Females, ages 6 and 13, remained playing in the park at location for approximately 15 minutes when the suspect called them over to his vehicle which was parked at the west parking lot. Upon approaching the vehicle the victims stated that suspect was outside his vehicle in a stopped position with his trouser fly open and his penis protruding. Suspect then gave the victims a book, which is held in evidence, asking if the victims would read it for him. While the victims looked at the book, the suspect began masturbating. Victims stated they looked at the first page of the comic book and at the suspect and then ran away from the suspect, throwing the book down as they fled. At that time the police unit arrived at the location."

4. *Exhibits Obscene Cards.* A juvenile aged 15 exhibited 5 playing cards all with indecent photographs to a 12-year old. Upon investigation, it was revealed that he had received them from a 16-year old and that many of his friends had similar playing cards in their possession, but that he did not know where they got them.

5. "There was a County Sheriff's Office case that occurred just north of the city limits a couple of years ago. A man was cohabitating with a woman who had a 10-year old daughter. The woman worked during the day while the man stayed home with the daughter. The man had in his possession numerous catalogs from a

firm named 'Nutrix' that was located in New Jersey. The catalogs were labeled, 'Special Bondage Issue' and showed samples of photographs that could be purchased in sets illustrating females in various flagellistic as well as other algolagnic poses. Apparently the pictures excited him to the point that he began to act them out with the young daughter. He began by making her strip and do housework in the nude. While the girl was working around the house he would strap her bare bottom as the tendency struck him. Later, he suspended the nude girl by her ankles from the rafters in the garage and committed an act of cunnilingus upon her."

7. "Another case that occurred a few years ago concerned a barber. He used girlie magazines on his youthful teenage customers and when they were inflamed he would commit an act of fellatio upon them. He was never prosecuted for this due to the fact that we were unable to convince a victim's parents to allow the kids to testify. The barber was arrested for a violation of plain drunk and while he was in custody, I questioned him about the alleged acts and he stated that they were in fact true."

8. "There were other cases there too involving the use of hard core pornography—one case (a breach of peace) where this guy was mad at his neighbor, so he dropped dirty pictures on the sidewalk and his lawn so that his kids could see them."

9. There was that knucklehead who was taking the pictures for Fizeek and Trim. We pinched him on a check warrant. In his possession he had a whole bunch of homosexual stuff—hardcore—some Mickey Mouse movies and also some Trim, View, and Fizeek magazines. Supposedly he was a photographer. He was

taking pictures of kids to submit them to these magazines. He had form letters which he would send to his models to get the kids to pose with questions such as, 'What grade are you in?' 'Do you pose in the nude?' etc. He had a kid in college who wrote him that there was a great market for that stuff in the area —that the kids would go nuts about it."

SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term, 1967

No. 47

SAM GINSBERG,

Appellant,

—v.—

THE STATE OF NEW YORK,

Appellee.

No. 64

UNITED ARTISTS CORPORATION,

Appellant,

—v.—

CITY OF DALLAS,

Appellee.

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, NEW YORK CIVIL LIBERTIES UNION, AND TEXAS CIVIL LIBERTIES UNION, AMICI CURIAE

OSMOND K. FRAENKEL
120 Broadway
New York, N. Y. 10005

EDWARD J. ENNIS
8 West 40th Street
New York, N. Y. 10018

MELVIN L. WULF
ALAN H. LEVINE
156 Fifth Avenue
New York, N. Y. 10010

FRED O. WELDON, JR.
1601 National Bankers Life Building
Dallas, Texas 75201

Attorneys for Amici Curiae

INDEX

PAGE

Interest of Amici 1

Questions Presented 4

ARGUMENT:

I. The statutes violate the First and Fourteenth Amendments because they are unconstitutional restrictions on freedom of speech 4

II. The statutes are unconstitutionally vague 10

CONCLUSION 14

APPENDIX:

Dallas City Ordinance No. 11,284 and Section 484-h of the New York Penal Law 15

TABLE OF AUTHORITIES

Cases:

Butler v. Michigan, 352 U. S. 380 (1957) 4

Commercial Pictures Corp. v. Regents, 346 U. S. 587 (1954) 11

Engel v. Vitale, 370 U. S. 421 (1962) 5, 7, 9

Freedman v. Maryland, 380 U. S. 51 (1965) 13

PAGE

In re Gault, 18 L. Ed. 2d 527 (1966) 5, 7, 8
Gelling v. Texas, 343 U. S. 960 (1952) 11

Kingsley Int'l Pictures Corp. v. Board of Regents, 360 U. S. 684 (1959) 10, 11

Memoirs v. Massachusetts, 383 U. S. 413 (1966) 4

Paramount Film Distrib. Corp. v. City of Chicago, 172 F. Supp. 69 (N. D. Ill. 1959) 7
Police Comm'r v. Siegel Enterprises, Inc., 162 A. 2d 727 (Md. 1960) 7
Prince v. Massachusetts, 321 U. S. 158 (1944) 7

Roth v. United States, 237 F. 2d 786 (2d Cir. 1956) 9

School District v. Schempp, 374 U. S. 203 (1963) 5, 7, 8, 9
Smith v. California, 361 U. S. 147 (1959) 10
Superior Films, Inc. v. Department of Education, 346 U. S. 587 (1954) 11

Times Film Corp. v. City of Chicago, 365 U. S. 43 (1961) 10-11

West Virginia Bd. of Education v. Barnette, 319 U. S. 624 (1943) 5, 6, 7, 9
Winters v. New York, 333 U. S. 507 (1948) 11

United States Constitution:

First Amendment 4, 5, 6, 7, 8, 10, 12, 14
Fifth Amendment 5
Sixth Amendment 5
Fourteenth Amendment 4, 5

PAGE

Statutes:

Dallas City Ordinance No. 11,284 4

Pub. L. No. 90-100, Section 5(a)(3) 8

Section 484-h of the New York Penal Law 4

Miscellaneous:

Adler, Art and Prudence (1937) 8

Cairns, Paul & Wishner, Sex Censorship: The Assumptions of the Anti-Obscenity Law and the Empirical Evidence, 46 Minn. L. Rev. 1009 (1962) 9

Carmen, Movies, Censorship and the Law 244 (1966) 13

Comment, Exclusion of Children From Violent Movies, 67 Colum. L. Rev. 1149, 1168 (1967) 13

Comment, 67 Colum. L. Rev. 1149, 1154-55, 1158 (1967) 7, 9

Emerson, Toward a General Theory of the First Amendment, 72 Yale L. J. 877, 890 (1963) 13

Green, Obscenity, Censorship and Juvenile Delinquency, 14 U. Toronto L. J. 229, 234 (1962) 9

Henkin, Morals and the Constitution: The Sin of Obscenity, 63 Colum. L. Rev. 391 (1963) 9

R. Kuh, Foolish Figleaves? 251 (1967) 12

Moley, Are We Movie Mad? at 16, 36-40 (1938) 8

Murphy, The Value of Pornography, 10 Wayne L. Rev. 655 (1964) 9

Sex Offenders, published by the Kinsey Institute in 1965 8

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MOTION OF AMERICAN CIVIL LIBERTIES UNION, NEW YORK CIVIL LIBERTIES UNION, AND TEXAS CIVIL LIBERTIES UNION FOR LEAVE TO FILE BRIEF, AMICI CURIAE

The American Civil Liberties Union, and its New York and Texas affiliates, move for leave to file a brief amici curiae in the two within cases. Attorneys for the parties in both cases, with the exception of the City of Dallas, have granted consent.

The American Civil Liberties Union is opposed to censorship in general, to film classification in particular as in No. 64, and to variable censorship standards depending on the age of the audience.

The statutes involved in the cases at bar are forms of prior censorship and thus violate the First Amendment. Although certain films and publications are thought by some members of the community to be unsuitable for children, it is up to parents, not governmental agencies, to decide what their children should see or read. Individual parents may heed the advice of various experts in determining what is good for their children, but they must be in the end be left free to accept or reject such advice as they see fit. The divergent views of parents on this subject are so numerous that it would be impossible for any official authority to formulate a consistently wise policy that could be applied to all children.

The practical effect of censorship for children is to lead producers and publishers to avoid censorable or controversial subjects designed for a wide audience, for many subjects—divorce, adultery, the intermixing of races—have been the target of censorship at some time. Thus free expression of opinion is inevitably discouraged.

The American Civil Liberties Union believes that its views on the constitutional problems involved in these cases will be of assistance to the Court and moves for leave to file the attached brief.

Respectfully submitted,

MELVIN L. WULF,
Attorney for Movants

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BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, NEW YORK CIVIL LIBERTIES UNION, AND TEXAS CIVIL LIBERTIES UNION, AMICI CURIAE

Interest of Amici

The interest of amici is set forth in the Motion for Leave to File this brief, *supra.*

Questions Presented

Whether Dallas City Ordinance No. 11,284 and Section 484-h of the New York Penal Law, which prohibit the exhibition of films and sale of books to minor children which are deemed, respectively, "not suitable for young persons" or "harmful to minors," violate the First and Fourteenth Amendments to the United States Constitution.*

ARGUMENT

I.

The statutes violate the First and Fourteenth Amendments because they are unconstitutional restrictions on freedom of speech.

Both statutes would be unarguably unconstitutional as a denial of First Amendment rights of both distributor and viewer were it not for the fact that they purport only to restrain dissemination of material to children. *Memoirs* v. *Massachusetts,* 383 U. S. 413 (1966) and *Butler* v. *Michigan,* 352 U. S. 380 (1957) clearly hold that protected materials may be withheld from the entire community because of their sexual content only if they are "utterly without redeeming social value," and may not be banned merely because they might offend young readers, listeners or viewers. These well-established principles are said not to apply under the statutes at bar, however, because they prohibit only distribution to minors.

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* The statutes are set out in full in the Appendix, *infra.*

The only justifications that might seriously be advanced for these statutes are (a) that children are not entitled to exercise substantial First Amendment freedoms or (b) that an overriding state interest justifies invading the publisher's right to speak and the child's right to hear. Neither justification withstands analysis.

This Court has not dealt at length with the extent to which the Constitution protects the right of minors to speak freely and to hear what they wish. In other areas, however, the Court has made it clear that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." *In re Gault,* 387 U. S. 1 (1967). *Gault* makes it crystal clear that the state may not, under the guise of according special protections aimed solely at minors, deny them the full protections of the Fifth and Sixth Amendments. And the power of the state to provide for and direct the education of children does not permit invasion of their right to enjoy the free exercise of religion or allow the imposition of religion. *School District* v. *Schempp,* 374 U. S. 203 (1963); *Engel* v. *Vitale,* 370 U. S. 421 (1962). Nor may the state force minors to utter words which offend their religious principles. *West Virginia Bd. of Education* v. *Barnette,* 319 U. S. 624 (1943).

It would indeed be inconsistent were minors to enjoy these freedoms but at the same time lose the right to think, speak, read and listen free of imposition of governmental censorship. In fact, this Court has already taken a much broader view. In dealing with the rights of children to resist the force-feeding of patriotic rituals, the Court has said:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political con-

troversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty and property, to free speech, a free press, freedom of worship and assembly . . . may not be submitted to vote; they depend on the outcome of no elections. *Barnette, supra,* at 638.

There is another more restrictive view of the First Amendment that could be proposed to justify broader censorship of material aimed at children than that disseminated in the adult community. Arguably, the purpose of permitting free expression is to allow society to make a rational choice among competing points of view; and it can plausibly be maintained that only adults should be allowed to do the choosing. This theory assumes that the average citizen is qualified to sort out and evaluate the ideas presented to him, but it does not assume that he can do so whatever his age. It assumes that a child cannot sort and evaluate, but will accept uncritically what he reads and hears.

"This theory of the First Amendment is too narrow. It overlooks the obvious: that today's children are tomorrow's adults. Because a child will accept uncritically what he hears, he is to hear nothing but what the majority wants him to hear. Having heard, and by hypothesis accepted, nothing but orthodoxy all his life, he is suddenly to be transformed into a rational adult who will choose impartially in the marketplace of ideas. Surely this is too much to expect. Surely if we let any orthodoxy monopolize the minds of our children, we risk letting it control the future of our

society. The First Amendment, then, if its purpose is to preserve authentic competition among opinions, must protect expression to children as well as adults." Comment, 67 Colum. L. Rev. 1149, 1158 (1967) (footnotes omitted).

Thus, the First Amendment requires that children not be excluded from the full range of material which that Amendment is designed to protect. They too must have the freedom to enter the marketplace of political and cultural ideas. Material of redeeming social value cannot be withheld from minors without undermining the purposes of the First Amendment. The presence or absence of candid sexual portrayals may not be made the sole criterion of censorship, regardless of the age of the audience being sheltered. "The right of young persons to read what they will . . . is vital not only to them but to all our citizenry." *Police Comm'r* v. *Siegel Enterprises, Inc.*, 162 A. 2d 727, 731 (Md. 1960). In short, the First Amendment forbids the concept of variable obscenity incorporated in the statutes at bar. *Paramount Film Distrib. Corp.* v. *City of Chicago*, 172 F. Supp. 69 (N. D. Ill. 1959).

No valid state interest in the preservation of child welfare is at stake here which would justify overriding these substantial First Amendment goals. *Gault, Engel, Schempp* and *Barnette* all reject the notion that the governmental interest in child welfare is so overpowering, that First Amendment rights may be relaxed whenever a state sees fit to do so. *Prince* v. *Massachusetts*, 321 U. S. 158 (1944), lends no support to these statutes. That case extends no further than its specific facts. See *Prince* at 171. Moreover, the Court there was especially cognizant

of the dangers to young persons from "the crippling effects of child employment . . . and the possible harms arising from other activities subject to the diverse influences of the street." *Prince* at 168. It was the presence of this tangible and demonstrable evil that led the Court to justify governmental tampering with a tangential exercise of religious freedom, and the sweeping dicta concerning the state's power to protect child welfare *in loco parentis* must be read in the light of the historic dangers of child labor as well as later re-assessment of those dicta implicit in *Schempp* and *Gault*.

Here, the State of New York and the City of Dallas assert no tangible reason for these broad limitations on First Amendment freedoms. The Dallas ordinance itself suggests that its purpose is to prevent anti-social behavior, but there is no reputable evidence that candid sexual portrayals influence viewers to commit crimes.* In fact, the available evidence is to the contrary. A major conclusion of the careful study, Sex Offenders, published by the Kinsey Institute in 1965, is that so-called pornographic mate-

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* A series of monographs on children and the movies, published by the Payne Fund in 1933, include some studies purporting to prove that movies have a substantial influence on child behavior. Dr. Mortimer Adler has said these pamphlets exemplify "the worst . . . kind of work that is done today in psychology and the social sciences." Quoted in Moley, Are We Movie Mad? at 16 (1938). Adler was careful to point out that two or three of the studies were carried out fairly. These invariably failed to correlate movie attendance with anti-social action. Moley at 36-40. Adler's extensive critique of the Payne Fund work may be found in Adler, Art and Prudence (1937). The same conclusion is reflected in a recent federal statute, Pub. L. No. 90-100 (October 3, 1967), creating a Commission on Obscenity and Pornography. Section 5(a)(3) states that one of the major purposes of the Commission is "to study the effect of obscenity and pornography upon the public, and particularly minors, and its relationship to crime and other anti-social behavior."

rials are not a factor in the causation of sex offenses. Discussing the work of the country's foremost experts on juvenile delinquency, Sheldon and Eleanor Glueck, one commentator has observed that they

> "... have consistently traced anti-social behavior traits to the individual's physical constitution and home environment, rather than movies and books. '[O]ne does not get at the basic problems presented by the energetic, adventure-thirsty mesomorphic lad by taking movies or comics away from him. If he has a need for such outlets he will somehow get to them; and *deprivation is no cure.*' It appears that anti-social traits are developed at an extremely early age, before the child is capable of intelligent comprehension of films. In developing yardsticks for predicting juvenile delinquency, no reliance is placed on the individual's entertainment material." Comment, 67 Colum. L. Rev. 1149, 1154-55 (1967) (footnotes omitted). See also Id. at note 47.*

Neither statute contains any suggestion that its impact is limited to those authors who attempt to exploit curiosity in sex for commercial gain. In fact, the facts underlying each of these cases thoroughly disprove that notion. Nor, in the face of *Engel, Schempp,* and *Barnette,* can it be main-

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* Other authors have reached the same conclusion. See *Roth* v. *United States,* 237 F. 2d 786, 802 (2d Cir. 1956) (dissenting opinion Frank, J.), aff'd 354 U. S. 476 (1957); Murphy, The Value of Pornography, 10 Wayne L. Rev. 655 (1964); Cairns, Paul & Wishner, Sex Censorship: The Assumptions of the Anti-Obscenity Law and the Empirical Evidence, 46 Minn. L. Rev. 1009 (1962); Green, Obscenity, Censorship and Juvenile Delinquency, 14 U. Toronto L. J. 229, 234 (1962); Henkin, Morals and the Constitution: The Sin of Obscenity, 63 Colum. L. Rev. 391 (1963).

tained that the state's powers of education are sufficient to justify these measures.

In sum, one cannot say what evil it is that Dallas and New York are attempting to control with such legislation, other than penalizing speech which is thought to be immoral or the medium of impure ideas—an objective that is clearly impermissible. See *Kingsley Pictures* v. *Board of Regents*, 360 U. S. 684 (1959).

Proponents of the statutes at bar are unable to produce a tenable constitutional principle that would validate age classification censorship on the basis of sex content and which at the same time would save from constitutional invalidity censorship designed to prevent children from seeing, reading or hearing materials governmental officials deem offensive. There is no principled distinction between these forms of censorship and the variable obscenity concept. Analytically, each has an equal claim to validity under the Constitution. The First Amendment demands that each be declared invalid.

II.

The statutes are unconstitutionally vague.

The void-for-vagueness doctrine requires that statutes be sufficiently specific so that a person may reasonably predict whether his intended behavior will bring him within the restrictions and sanctions imposed by the law. Stricter vagueness criteria are applicable to statutes infringing on freedom of speech, *Smith* v. *California*, 361 U. S. 147, 150-52 (1959), because considerations beyond the individual interest in fair notice are present. Moreover, "the fear of the censor by the composer of ideas acts as a substantial deterrent to the creation of new thoughts." *Times Film*

Corp. v. *City of Chicago,* 365 U. S. 43, 75 (1961) (dissenting opinion of Warren, Ch.J.).

Censorship standards classified by this Court as too vague include "sacrilegious", *Joseph Burstyn, Inc.* v. *Wilson,* 343 U. S. 495 (1952); "of such character as to be prejudicial to the best interests of the people", *Gelling* v. *Texas,* 343 U. S. 960 (1952); "on account of being harmful", *Superior Films, Inc.* v. *Department of Education,* 346 U. S. 587 (1954); "immoral" and tending "to corrupt morals", *Commercial Pictures Corp.* v. *Regents,* 346 U. S. 587 (1954); and "obscene, indecent, immoral, inhuman, sacrilegious," or "would tend to corrupt morals," *Kingsley Int'l Pictures Corp.* v. *Regents,* 360 U. S. 684 (1959).

In the light of past decisions, the Dallas statute is hopelessly vague. Its terms are at least as devoid of meaning as those set forth above. By making the legality of speech depend upon the whimsical opinion of a board of citizens, the Dallas statute sets the censors "adrift upon a boundless sea amid a myriad of conflicting . . . views, with no charts" to guide them. *Joseph Burstyn, Inc.* v. *Wilson,* 343 U. S. 495, 504-05 (1952). Censorship based on the belief that material is "likely to incite or encourage delinquency" clearly runs afoul of the doctrine of *Winters* v. *New York,* 333 U. S. 507 (1948), which held unconstitutionally vague a book censorship statute forbidding "the massing of stories of . . . lust in such a way as to incite crime against the person." Id. at 514. In fact, "the judgment of the Board" relied upon by the Dallas statute is more than vague; it is nonexistent. No judgment is rendered until the publisher has already acted. How is he to conform his behavior to the future whims of persons unknown to him? What does it mean to advise a film producer that his work will be banned on the theory that it is likely to encourage

sexual promiscuity if a local censorship board feels there is a "substantial probability" that it will give young persons the "impression" that "sexual promiscuity" is "profitable" or "desirable"? By what standards does a court review a determination that "in the judgment of the Board" the "dominant effect" of a film is "substantially" to "arouse sexual desire"?

The unintelligible vagueness of the New York statute has been conceded by a proponent of age classification censorship. He notes that the statute contains "all the words that hardly any two judges seemed to have been able to interpret alike, . . . peppered liberally with the words 'for minors' ". R. Kuh, Foolish Figleaves? 251 (1967). How is the average bookseller to discover the "prevailing standards in the adult community . . . with respect to what is suitable material for minors" or what constitutes "redeeming social importance for minors"?

Furthermore, failing to delineate in precise terms what booksellers and film producers may or may not do will discourage those who are cautious or unable to afford litigation from selling materials to minors that the law was not in fact intended to proscribe. These statutes will inevitably result in a broader scope of actual censorship than any court would wish to permit.

Validation of these statutes will also result in more than excessive self-censorship. Official censorship itself, when limited by terms as imprecise as these, is certain to exceed the limits intended by any court or legislature cognizant of the First Amendment values at stake here. One commentator has concluded, after a thorough survey of eight motion picture censorship boards, that "[t]he basic problem with motion picture censorship is that wherever

it is put into practice it flouts the supreme law of the land day after day and year after year." Carmen, Movies, Censorship and the Law 244 (1966). "Granting further latitude to the censors is certain to multiply the horrors already perpetrated by those institutions of official dogma. We do not know what [materials] may be suppressed in the name of child welfare—but the works of Hemingway, Salinger, Moravia, Maugham, Dumas, Voltaire, de Maupassant, Tolstoy, Zola and Freud have been officially deemed unfit for adults in the past." Comment, Exclusion of Children From Violent Movies, 67 Colum. L. Rev. 1149, 1168 (1967) (footnotes omitted). See also Id. at 1167, n. 107; Emerson, Toward a General Theory of the First Amendment, 72 Yale L. J. 877, 890 (1963).

The dangers inherent in the administration of vague censorship statutes are fully present in both cases under consideration here. In Dallas, an official board performs the censorship function; in New York, it is the police. Nor is the Dallas statute saved by the provision for judicial review. The judge applies the same standards utilized by the Board* and the producer and distributor can avoid criminal sanctions only by suffering censorship. Surely the right of persons to be free from penalties imposed by vague criminal censorship statutes cannot vary with the audience sought to be restricted; it is their rights, not those

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* The fact that "the judgment of the Board" is an indispensable prerequisite to a finding, under the Dallas ordinance, that a film is censorable inevitably leads to the conclusion that the statute fails to meet the standards of *Freedman* v. *Maryland*, 380 U. S. 51 (1965). That case requires de novo judicial review of all acts of any film censorship board. The standards of the Dallas ordinance reduce the judge's function to determining whether the Board's adjudication was an abuse of discretion. No court can make a de novo finding of whether or not a film is, *in the judgment of the Board*, likely to incite young persons to anti-social behavior.

of their audience, that the void-for-vagueness doctrine is intended to protect.

Where First Amendment rights are being infringed, one will not be heard to argue that it is better to cope with the difficulties and irrationalities of administration than to have no law at all.

CONCLUSION

For the reasons stated above, the convictions should be reversed.

Respectfully submitted,

Osmond K. Fraenkel
120 Broadway
New York, N. Y. 10005

Edward J. Ennis
8 West 40th Street
New York, N. Y. 10018

Melvin L. Wulf
Alan H. Levine
156 Fifth Avenue
New York, N. Y. 10010

Fred O. Weldon, Jr.
1601 National Bankers Life Building
Dallas, Texas 75201

Attorneys for Amici Curiae

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The attorneys for amici are grateful to Mr. Thomas G. Krattenmaker, third year student at Columbia Law School, for his invaluable assistance in preparation of this brief.

APPENDIX

Statutes

DALLAS CITY ORDINANCE NO. 11,284

MOTION PICTURE CLASSIFICATION ORDINANCE

§ 46A-1 Definition of Terms
§ 46A-2 Establishment of Classification Board
§ 46A-3 Classification Procedure
§ 46A-4 Offenses
§ 46A-5 License
§ 46A-6 Revocation or suspension of license
§ 46A-7 Judicial Review
§ 46A-8 Public Nuisances
§ 46A-9 Injunctions
§ 46A-10 Exception to State Law
§ 46A-11 Severability Clause

Section 46A-1. *Definition of Terms:*

(a) "Film" means any motion picture film or series of films, whether full length or short subject, but does not include newsreels portraying actual current events or pictorial news of the day.

(b) "Exhibit" means to project a film at any motion picture theatre or other public place within the City of Dallas to which tickets are sold for admission.

(c) "Exhibitor" means any person, firm or corporation which exhibits a film.

(d) "Young person" means any person who has not attained his sixteenth birthday.

(e) "Board" means the Dallas Motion Picture Classification Board established by Section 46A-2 of this ordinance.

(f) "Not suitable for young persons" means:

(1) Describing or portraying brutality, criminal violence or depravity in such a manner as to be, in the judgment of the Board, likely to incite or encourage crime or delinquency on the part of young persons; or

(2) Describing or portraying nudity beyond the customary limits of candor in the community, or sexual promiscuity or extra-marital or abnormal sexual relations in such a manner as to be, in the judgment of the Board, likely to incite or encourage delinquency or sexual promiscuity on the part of young persons or to appeal to their prurient interest.

A film shall be considered 'likely to incite or encourage' crime delinquency or sexual promiscuity on the part of young persons, if, in the judgment of the Board, there is a substantial probability that it will create the impression on young persons that such conduct is profitable, desirable, acceptable, respectable, praiseworthy or commonly accepted. A film shall be considered as appealing to 'prurient interest' of young persons, if in the judgment of the Board, its calculated or dominant effect on young persons is substantially to arouse sexual desire. In determining whether a film is 'not suitable for young persons', the Board shall consider the film as a whole, rather than isolated portions, and shall determine whether its harmful effects outweigh artistic or educational values such film may have for young persons.

(g) 'Classify' means to determine whether a film is:

(1) Suitable for young persons, or;

(2) Not suitable for young persons.

(h) 'Advertisement' means any commercial promotional material initiated by an exhibitor designed to bring a film to public attention or to increase the sale of tickets to exhibitions of same, whether by newspaper, billboard, motion picture, television, radio, or other media within or originating within the City of Dallas.

(i) 'Initial exhibition' means the first exhibition of any film within the City of Dallas.

(j) 'Subsequent exhibition' means any exhibition subsequent to the initial exhibition, whether by the same or a different exhibitor.

(k) 'File' means to deliver to the City Secretary for safekeeping as a public record of the City of Dallas.

(l) 'Classification order' means any written determination by a majority of the Board classifying a film, or granting or refusing an application for change of classification.

(m) The term 'Board' as used and applied in subsection (a) of Section 46A-7 shall include the City of Dallas when attempting to enforce this ordinance and the City Attorney of the City of Dallas when representing the Board or the City of Dallas.

Section 46A-2. *Establishment of Board.*

There is hereby created a Board to be known as the Dallas Motion Picture Classification Board which shall be composed of a Chairman and Eight Members to be appointed by the Mayor and City Council of the City of Dallas, whose terms shall be the same as members of the City Council. Such members shall serve without pay and shall adopt such rules and regulations as they deem best governing their

action, proceeding and deliberations and time and place of meeting. These rules and regulations shall be subject to approval of the City Council. If a vacancy occurs upon the Board by death, resignation or otherwise, the governing body of the City of Dallas shall appoint a member to fill such vacancy for the unexpired term.

The Chairman and all Members of the Board shall be good, moral, law-abiding citizens of the City of Dallas, and shall be chosen so far as reasonably practicable in such a manner that they will represent a cross section of the community. Insofar as practicable, the members appointed to the Board shall be persons educated and experienced in one or more of the following fields: art, drama, literature, philosophy, sociology, psychology, history, education, music, science or other related fields. The City Secretary shall act as Secretary of the Board.

Section 46A-3. *Classification Procedure:*

(a) Before any initial exhibition, the exhibitor shall file a proposed classification of the film to be exhibited, stating the title of the film and the name of the producer, and giving a summary of the plot and such other information as the Board may by rule require, together with the classification proposed by the exhibitor. The Board shall examine such proposed classification, and if it approves same, shall mark it 'approved' and file it as its own classification order. If the Board fails to act, that is, either file a classification order or hold a hearing within five (5) days after such proposed classification is filed, the proposed classification shall be considered approved.

(b) If upon examination of the proposed classification a majority of the Board is not satisfied that it is proper, the

Chairman shall direct the exhibitor to project the film before any five (5) or more members of the Board, at a suitably equipped place and at a specified time, which shall be the earliest time practicable with due regard to the availability of the film. The exhibitor, or his designated representative, may at such time make such statement to the Board in support of his proposed classification and present such testimony as he may desire. Within two (2) days, the Board shall make and file its classification of the film in question.

(c) Any initial or subsequent exhibitor may file an application for a change in the classification of any film previously classified. No exhibitor shall be allowed to file more than one (1) application for change of classification of the same film. Such application shall contain a sworn statement of the grounds upon which the application is based. Upon filing of such application, the City Secretary shall bring it immediately to the attention of the Chairman of the Board, who upon application by the exhibitor shall set a time and place for a hearing and shall notify the applicants and all interested parties, including all exhibitors who may be exhibiting or preparing to exhibit the film. The Board shall view the film and at such hearing, hear the statements of all interested parties, and any proper testimony that may be offered, and shall within two (2) days thereafter make and file its order approving or changing such classification. If the classification of a film is changed as a result of such hearing to the classification 'not suitable for young persons', the exhibitors showing the film shall have seven (7) days in which to alter their advertising and audience policy to comply with such classification.

(d) Upon filing by the Board of any classification order, the City Secretary shall immediately issue and mail a notice of classification to the exhibitor involved and to any other exhibitor who shall request such notice.

(e) A classification shall be binding on any subsequent exhibitor unless and until he obtains a change of classification in the manner above provided.

Section 46A-4. *Offenses:*

(a) It shall be unlawful for any exhibitor or his employee:

(1) To exhibit any film which has not been classified as provided in this ordinance.

(2) To exhibit any film classified 'not suitable for young persons' if any current advertisement of such film by such exhibitor fails to state clearly the classification of such film.

(3) To exhibit any film classified 'not suitable for young persons' without keeping such classification posted prominently in front of the theatre in which such film is being exhibited.

(4) Knowingly to sell or give to any young person a ticket to any film classified 'not suitable for young persons'.

(5) Knowingly to permit any young person to view the exhibition of any film classified 'not suitable for young persons'.

(6) To exhibit any film classified 'not suitable for young persons' or any scene or scenes from such a film, or from an unclassified film, whether moving or still, in

the same theatre and on the same program with a film classified 'suitable for young persons'; provided that any advertising preview or trailer containing a scene or scenes from an unclassified film or a film classified 'not suitable for young persons' may be shown at any time if same has been separately classified as 'suitable for young persons' under the provisions of Section 46A-3 of this ordinance.

(7) To make any false or willfully misleading statement in any proposed classification, application for change of classification, or any other proceeding before the Board.

(8) To exhibit any film classified 'not suitable for young persons' without having in force the license hereinafter provided.

(b) It shall be unlawful for any young person:

(1) To give his age falsely as sixteen (16) years of age or over, for the purpose of gaining admittance to an exhibition of a film classified 'not suitable for young persons.'

(2) To enter or remain in the viewing room of any theatre where a film classified 'not suitable for young persons' is being exhibited.

(3) To state falsely that he or she is married for the purpose of gaining admittance to an exhibition of a film classified as 'not suitable for young persons.'

(c) It shall be unlawful for any person:

(1) To sell or give any young person a ticket to an exhibition of a film classified 'not suitable for young persons.'

(2) To make any false or willfully misleading statement in an application for change of classification or in any proceeding before the Board.

(3) To make any false statements for the purpose of enabling any young person to gain admittance to the exhibition of a film classified 'not suitable for young persons.'

(d) To the extent that any prosecution or other proceeding under this ordinance, involves the entering, purchasing of a ticket, or viewing by a young person of a film classified 'not suitable for young persons', it shall be a valid defense that such young person was accompanied by his parent or legally appointed guardian, husband or wife, throughout the viewing of such film.

Section 46A-5. *License*:

Every exhibitor holding a motion picture theatre or motion picture show license issued pursuant to Chapter 46 of the 1960 Revised Code of Civil and Criminal Ordinances of the City of Dallas shall be entitled to issuance of a license by the City Secretary to exhibit films classified 'not suitable for young persons'.

Section 46A-6. *Revocation or suspension of license*:

Whenever the City Attorney or any person acting under his direction, or any ten (10) citizens of the City of Dallas, shall file a sworn complaint with the City Secretary stating that any exhibitor has repeatedly violated the provisions of this ordinance, or that any exhibitor has persistently failed to use reasonable diligence to determine whether those seeking admittance to the exhibition of a film classified 'not suit-

able for young persons' are below the age of sixteen (16), the City Secretary shall immediately bring such complaint to the attention of the City Council who shall set a time and place for hearing such complaint and cause notice of such hearing to be given to the complainants and to the exhibitor involved. The City Council shall have authority to issue subpoenas requiring witnesses to appear and testify at such hearing, and any party to such hearing shall be entitled to such process. If, after hearing the evidence, the City Council shall find the charges in such complaint to be true, it shall issue and file and order revoking or suspending the license above provided, insofar as it grants the privilege of showing such classified pictures, for a specific period not to exceed one (1) year, or may issue a reprimand if it is satisfied that such violation will not continue.

The City Council likewise, after notice and hearing, may revoke or suspend the license of any exhibitor who has refused or unreasonably failed to produce or delayed the submission of a film for review, when requested by the Board.

Section 46A-7. *Judicial Review*:

(a) Within two (2) days after the filing of any classification by the Board, other than an order approving the classification proposed by an exhibitor, any exhibitor may file a notice of non-acceptance of the Board's classification, stating his intention to exhibit the film in question under a different classification. Thereupon it shall be the duty of the Board to do the following:

(1) Within three (3) days thereafter to make application to a District Court of Dallas County, Texas, for a temporary and a permanent injunction to enjoin such

defendant-exhibitor, being the exhibitor who contests the classification, from exhibiting the film in question contrary to the provisions of this ordinance.

(2) To have said application for temporary injunction set for hearing within five (5) days after the filing thereof. In the event the defendant-exhibitor appears at or before the time of the hearing of such temporary injunction, waives the notice otherwise provided by the Texas Rules of Civil Procedure, and requests that at the time set for such hearing the Court proceed to hear the case under the Texas Rules of Civil Procedure for permanent injunction on its merits, the Board shall be required to waive its application for temporary injunction and shall join in such request. In the event the defendant-exhibitor does not waive notice and/or does not request an early hearing on the Board's application for permanent injunction, it shall nevertheless be the duty of the board to obtain the earliest possible setting for such hearing under the provisions of State law and the Texas Rules of Civil Procedure.

(3) If the injunction is granted by the trial court and the defendant-exhibitor appeals to the Court of Civil Appeals, the Board shall waive any and all statutory notices and times as provided for in the Texas State Statutes and Texas Rules of Civil Procedure, and shall within five (5) days after receiving a copy of appealing exhibitor's brief, file its reply brief, if required, and be prepared to submit the case upon oral submission or take any other reasonable action requested by the appealing exhibitor to expedite the submission of the case to the Court of Civil Appeals, and

shall upon request of the appealing exhibitor, jointly with such exhibitor, request the Court of Civil Appeals to advance the cause upon the docket and to give it a preferential setting the same as is afforded an appeal from a temporary injunction or other preferential matters.

(4) If the Court of Civil Appeals should by its judgment affirm the judgment of the trial court granting the injunction and the appealing exhibitor should file an application for writ of error to the Texas Supreme Court, the Board shall be required to waive any and all notices and times as provided for in the Texas State Statutes and the Texas Rules of Civil Procedure, and shall within five (5) days after receiving a copy of the application for writ of error, file its reply brief, if required, and be prepared to submit the case upon oral submission or take any other reasonable action requested by the appealing exhibitor to expedite the submission of the case to the Supreme Court and shall upon request of the appealing exhibitor, jointly with such exhibitor, request the Supreme Court to advance the cause upon the docket and to give it a preferential setting the same as is afforded an appeal from a temporary injunction or other preferential matters.

(5) If the District Court denies the Board's application for injunction, and the Board elects to appeal, the Board shall be required to waive all periods of time allowed it by the Texas Rules of Civil Procedure and if a motion for a new trial is required, shall file said motion within two (2) days after the signing of the judgment, (or on the following Monday if said period ends on a Saturday or Sunday, or on the day following if

the period ends on a Legal Holiday), shall not amend said motion and shall obtain a hearing on such motion within five (5) days time. If no motion for a new trial is required as a prerequisite to an appeal under the Texas Rules of Civil Procedure, the Board shall not file such a motion. Within ten (10) days after the judgment is signed by the District Court denying such injunction or within ten (10) days after the order overruling the Board's motion for new trial is signed, if such motion is required, the Board shall complete all steps necessary for the perfection of its appeal to the Court of Civil Appeals, including the filing of the Transcript, Statement of Facts and Appellant's brief. Failure to do so shall constitute an abandonment of the appeal. On filing the record with the Court of Civil Appeals, the Board shall file a motion to advance requesting the Court to give a preferential setting the same as is afforded an appeal from a temporary injunction or other preferential matters.

(6) If the Court of Civil Appeals reverses the trial court after the trial court has granted an injunction, or if the Court of Civil Appeals refuses to reverse the trial court after that court has failed to grant an injunction, then if the Board desires to appeal from the decision of the Court of Civil Appeals by writ of error to the Supreme Court of the State of Texas, it must file its motion for rehearing within two (2) days of rendition of the decision of the Court of Civil Appeals (or on the following Monday, if said period ends on a Saturday or Sunday, or on the day following if the period ends on a Legal Holiday), and shall file its application for writ of error within ten (10) days after

the Court of Civil Appeals' order overruling such motion for rehearing, and failure to do shall waive all rights to appeal from the decision of the Court of Civil Appeals. At the time of filing the application for writ of error, the Board shall also request the Supreme Court to give the case a preferential setting and advance the same on the docket.

(b) The filing of such notice of non-acceptance shall not suspend or set aside the Board's order, but such order shall be suspended at the end of ten (10) days after the filing of such notice unless an injunction is issued within such period.

(c) Failure of any exhibitor to file the notice of non-acceptance within two (2) days as required in Subdivision (1) of this Section 46A-7, shall constitute acceptance of such classification order and such exhibitor shall be bound by such order in all subsequent proceedings except such proceedings as may be had in connection with any application for change of classification under Subdivision (c) of Section 46A-3 above.

Section 46A-8. *Public Nuisances*:

The following acts are declared to be public nuisances:

(a) Any violation of Subdivisions (1), (2), (3), or (6), of Subdivision (a) of Section 46A-4 of this ordinance.

(b) Any exhibition of a film classified as 'not suitable for young persons' at which more than three (3) young persons are admitted.

(c) Any exhibition of a film classified as 'not suitable for young persons' by an exhibitor who fails to

use reasonable diligence to determine whether persons admitted to such exhibition are persons under the age of sixteen (16) years.

(d) Any exhibition of a film classified as 'not suitable for young persons' by an exhibitor who has been convicted of as many as three (3) violations of Subdivisions (4) or (5) of Subdivision (a) of Section 46A-4 of this ordinance in connection with the exhibition of the same film.

Section 46A-9. *Injunctions*:

Whenever the Board has probable cause to believe that any exhibitor has committed any of the acts declared in Section 46A-8 above to be a public nuisance, the Board shall have the duty to make application to a court of competent jurisdiction for an injunction restraining the commission of such acts.

Section 46A-10. *Exception to State Law*:

Nothing in this ordinance shall be construed to regulate public exhibitions pre-empted by Article 527 of the Penal Code of the State of Texas, as amended.

Section 46A-11. *Severability Clause*:

Should any section, subsection, sentence, provision, clause or phrase be held to be invalid for any reason, such holding shall not render invalid any other section, subsection, sentence, provision, clause or phrase of this ordinance, and the same are deemed severable for this purpose."

SECTION 2. That any person who shall violate any provisions of this ordinance shall be guilty of a misdemeanor

and upon conviction thereof shall be subject to a fine not to exceed Two Hundred Dollars ($200.00) and each offense shall be deemed to be a separate violation and punishable as a separate offense, and each day that a film is exhibited which has not been classified according to this ordinance shall be a separate offense.

SECTION 3. That Ordinance No. 10963 heretofore enacted by the City Council of the City of Dallas on April 5, 1965, be and the same is hereby in all things repealed and held for naught, and this ordinance is enacted in lieu thereof.

SECTION 4. The fact that Ordinance No. 10963 previously passed by the City Council of the City of Dallas has been declared to be unenforceable in the Courts by the Federal District Court, creates an urgency and an emergency in the preservation of the public peace, comfort and general welfare and requires that this ordinance shall take effect immediately from and after its passage, and it is accordingly so ordained.

New York Penal Law*

§ 484-h. EXPOSING MINORS TO HARMFUL MATERIALS

1. Definitions. As used in this section:

(a) "Minor" means any person under the age of seventeen years.

(b) "Nudity" means the showing of the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with

* The equivalent statute in the 1967 revised Penal Law is contained in Sections 235.20-235.22.

less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state.

(c) "Sexual conduct" means acts of masturbation, homosexuality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or, if such person be a female, breast.

(d) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(e) "Sado-masochistic abuse" means flagellation or torture by or upon a person clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

(f) "Harmful to minors" means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, when it:

(i) predominantly appeals to the prurient, shameful or morbid interest of minors, and

(ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and

(iii) is utterly without redeeming social importance for minors.

(g) "Knowingly" means having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of both:

(i) the character and content of any material described herein which is reasonably susceptible of examination by the defendant, and

(ii) the age of the minor, provided however, that an honest mistake shall constitute an excuse from liability hereunder if the defendant made a reasonable bona fide attempt to ascertain the true age of such minor.

2. It shall be unlawful for any person knowingly to sell or loan for monetary consideration to a minor:

(a) any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts nudity, sexual conduct or sado-masochistic abuse and which is harmful to minors, or

(b) any book, pamphlet, magazine, printed matter however reproduced, or sound recording which contains any matter enumerated in paragraph (a) of subdivision two hereof, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sado-masochistic abuse, and which, taken as a whole, is harmful to minors.

3. It shall be unlawful for any person knowingly to exhibit for a monetary consideration to a minor or knowingly to sell to a minor an admission ticket or pass or knowingly to admit a minor for a monetary consideration to premises whereon there is exhibited, a motion picture, show or other presentation which, in whole or in part, depicts nudity, sexual conduct or sado-masochistic abuse and which is harmful to minors.

4. A violation of any provision hereof shall constitute a misdemeanor. Added L. 1965, c. 327, eff. Sept. 1, 1965.

SUPREME COURT, U. S.

FILED

JAN 4 1968

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967

No. 47

SAM GINSBERG,

Appellant,

against

THE STATE OF NEW YORK,

Appellee.

ON APPEAL TO THE APPELLATE TERM OF THE SUPREME COURT OF THE STATE OF NEW YORK SECOND JUDICIAL DEPARTMENT

BRIEF FOR THE APPELLEE

WILLIAM CAHN
District Attorney
County of Nassau, State of New York
Attorney for Appellee
County Court House
Old Country Road
Mineola, New York

GEORGE DANZIG LEVINE
Assistant District Attorney
of Counsel

TABLE OF CONTENTS

	PAGE
Opinion Below	1
Jurisdiction	1
The Statute	2
Questions Presented	2
Statement	3
The Evidence	4
Summary of the Evidence at the Trial	5
Testimony of Richard Lance Corey	5
Testimony of complainant, Mary Corey	6
Testimony of Detective Sgt. Daniel Groh	7
Testimony of the Defendant	7
Testimony of Detective Albert Anderson on Rebuttal	12
Summary of Argument	13
ARGUMENT—The statute is not an unconstitutional restraint on free expression	23
POINT I—Section 484-h does not enact a total prohibition on the circulation of materials within the purview of the statute. The section merely enacts a ban on commercial distribution to children, thus serving to enforce parental control as well as the public policy of the state	23
POINT II—A State may enact a statutory prohibition against the commercial distribution to children of materials obscene as to them	25
A. Section 484-h is validly based on the variable obscenity concept	25
B. The scienter provision of 484-h is not unconstitutional as an undue restraint on the distribution of materials to adults	29

PAGE

C. There is no merit in the claim that the present method of enforcement of the obscenity laws is overly restrictive and that initiation of a criminal prosecution against a dealer without first obtaining a civil adjudication of obscenity against the publisher is constitutionally objectionable 41

D. The appellant's conviction may also be affirmed under the Ginzburg pandering rule 44

E. The definition of what is harmful to children in terms of the prevailing standards in the adult community is a constitutionally permissible legislative policy 46

F. Appellant cannot raise First Amendment objections to the statute's prohibition against distribution to children under seventeen years, since he was convicted under a children's obscenity law and obscene materials are not within the protection of the First and Fourteenth Amendments 48

POINT III—Even if 484-h were not an obscenity statute, it would still be constitutionally acceptable. 49

A. The statute's approach is a constitutionally permissible way of restraining the distribution to children of sex-oriented publications 49

B. The statute's constitutionality and this prosecution are vindicated by the balancing test 51

C. The clear and present danger test is not applicable to prosecutions under 484-h 57

D. Even if the clear and present danger test were applicable, and it is not, that test is now a delayed reaction test and does not require a showing of imminent or present danger or a demonstration that the evils apprehended by the legislature are certain of occurrence 65

PAGE

E. 484-h is not an anti-sin law; it may be justified on secular, utilitarian grounds 68

F. A state may impose limits on the distribution of sex-oriented publications to children to protect the morals of its young and the moral foundations of society 69

G. Even if the clear and present danger test were applicable, it has been satisfied, since legislative findings and expert opinion attest the harmful effects of sexual materials such as those banned in 484-h on the morals and behavior of the young 75

H. Legislation for the protection of the young from the corrupting effects of sex-oriented publications is sufficiently supported by existing knowledge and need not wait upon a scientific certainty which may never come 80

I. Since the state may prohibit the distribution of sexual literature to children even where it is not obscene as to children, the question of whether the state's proof in this prosecution was adequate to satisfy the obscenity criteria of 484-h is not a federal question 86

J. The extreme libertarian philosophy of the First Amendment is not inconsistent with the doctrinal underpinning of this prosecution 87

K. Section 484-h is not a prior restraint on expression, its enforcement is not futile, and it will not bar the distribution of great works of literature 88

PAGE

POINT IV—Section 484-h is not void for vagueness 90

A. The language of Section 484-h is modelled on the phraseology of the obscenity criteria propounded in the decisions of this Court and is in accord with constitutional mandates ... 90

B. The statutory phrases "reasonable attempt" and "knowingly" are not intolerably vague 94

C. The statutory words "shameful" and "morbid" have a recognized meaning and are not overbroad in their reach 95

D. The statutory test which makes "prevailing standards in the adult community as a whole with respect to what is suitable material for minors" the determinant of patent offensiveness, does not transgress the constitutional requirement of definiteness 97

E. The statutory phrase "prurient interest of minors" is not fatally ambiguous 98

F. The Brief *Amici Curiae* of the Civil Liberties Unions misinterprets the position of Mr. Richard H. Kuh, as expressed in "Foolish Figleaves?" 99

G. Appellant's contention that a depiction of "an ardent kiss or embrace" may be actionable under 484-h is mistaken 100

POINT V—Even if 484-h were constitutionally deficient, appellant cannot complain of it 101

POINT VI—The proof of guilt was sufficient 105

CONCLUSION 106

APPENDIX—The Statute Under Review on this Appeal 108

Table of Cases Cited

PAGE

A Book Named John Cleland's Memoirs, etc. v. Attorney General (383 U.S. 413) 27, 90, 92
American Communications Association C.I.O. v. Doud, 339 U.S. 382 .....51, 58, 65, 75
Application of Baruo, 76 F. Supp. 407 98
Associated Press v. NLRB, 301 U.S. 103 101
Atlantic Coast Line R. Co. v. Goldsboro, 232 U.S. 548

Baltimore & O. R.R. v. Groeger, 266 U.S. 521 93
Barenblatt v. United States, 360 U.S. 109 52
Beauharnais v. Illinois, 343 U.S. 210 54
Beer Company v. Massachusetts, 97 U.S. 23 69
Bookcase, Inc. v. Broderick, 18 N.Y. 2d 71 .26, 27, 28, 38, 40, 48, 50, 61, 75, 91, 96
Boyce, etc. v. United States, 342 U.S. 337 93
Breard v. Alexandria, 341 U.S. 622 ..... 51, 53
Brown v. Board of Education, 347 U.S. 483 ...29, 45, 68, 80
Brukiewicz v. Savoretti, 211 F.2d 541—5th Cir. 1954 98
Burns Baking Co. v. Bryan, 264 U.S. 504 29
Butler v. Michigan, 352 U.S. 380 50

Capuzzi, In re, 160 Misc. 200 97
Chaplinsky v. New Hampshire, 315 U.S. 568 ..... 53, 54
Chicago v. Doe, 197 NE 2d 711 36
Chicago Milwaukee and St. Paul Ry. Co. v. Minn., 134 U.S. 418 62
Chicago, TH and SE Ry. v. Anderson, 242 U.S. 283 101
Cincinnati v. Coy, 115 Ohio App. 478, 182 NE 2d 628 36
Communist Party of America v. Subversive Activities Control Board, 367 U.S. 1 .....39, 51, 58, 75, 102
Cox v. Louisiana, 379 U.S. 359 65
Crowell v. Benson, 285 U.S. 22 101

DayBrite Ltg. Co. v. Mo., 342 U.S. 421 62
DeJonge v. Oregon, 299 U.S. 353 58

PAGE

Dennis v. United States, 341 U.S. 494 . . . 51, 52, 58, 65, 66, 68, 75, 80, 81, 95, 102, 104
Dollar Company v. Canadian C & F Company, 220 N.Y. 270 101

Eisler v. United States, 338 U.S. 189 . . . . . 95, 101
Escola v. Coca Cola Bottling Co., 150 P.2d 436 (Calif.) 29, 45

Fox v. Washington, 236 U.S. 273 101
Frothingham v. Mellon, 262 U.S. 447 101

Ginzburg, 383 U.S. 463 . . . . . 44, 45, 46
Gitlow v. New York, 268 U.S. 652 75
Gorin v. United States, 312 U.S. 19 93

Hatch v. Reardon, 204 U.S. 152 101
Hawkins v. United States, 358 U.S. 74 . . . . . 29, 45
Holden v. Hardy, 169 U.S. 366 62
Hopp, In re, 197 F. 561 97

International Brotherhood of Teamsters v. Vogt, 354 U.S. 284 59

Jacobellis v. Ohio, 378 U.S. 184 . . . . . 26, 27, 50, 61, 76, 90
Jaechne v. New York, 128 U.S. 189 101

Kingsley Books, Inc. v. Brown, 354 U.S. 436 41
Kingsley Pictures Corp. v. Regents, 360 U.S. 684 73
Konigsberg v. State Bar, 366 U.S. 36 52

Larkin v. G. P. Putnam's Sons, 14 N.Y. 2d 399 51
Levy Leasing Co. v. Siegal, 258 U.S. 242 93
Louisiana News Co., In re, 187 Fed. Supp. 241 . . . . . 50, 55

Mahler v. Eby, 264 U.S. 32 93
Matthews v. State, 99 So. 2d 568, Fla. 50
Meyers v. Nebraska, 262 U.S. 390 55
Milk Wagon Drivers Union v. Meadowmoor Dairies, 312 U.S. 287 58
Miskin v. New York, 383 U.S. 502 . . . . . 26, 27, 28, 31, 35, 38, 39, 90, 95, 103

PAGE

Mo. Rate Cases, 230 U.S. 474 101
Mugler v. Kansas, 123 U.S. 623 ..... 29, 45, 68, 69
Munn v. Illinois, 94 U.S. 113 62
Muller v. Oregon, 208 U.S. 412 29

NAACP v. Alabama, 357 U.S. 449 52
Nash v. United States, 229 U.S. 373 93
Nebbia v. New York, 291 U.S. 502 62
New York Times v. Sullivan, 376 U.S. 254 ..... 51, 52
NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 .. 101
Noble State Bank v. Hashell, 219 U.S. 104 81

Ogden v. Saunders, 12 Wheaton 213 62
Old Dearborn District Co. v. Seagrams Distillers Corp., 299 U.S. 183 93

People v. Finkelstein, 11 N.Y. 2d 300 ..... 31, 35, 36, 37
People v. Harris, 192 Cal. App. 2d 887 ..... 36, 37
People v. Kahan, 15 N.Y. 2d 311 ..... 50, 69, 91
People v. Schenkman (20 Misc. 2d 1093, aff'd *sub nom.* People v. Finkelstein, 12 A.D. 2d 457, rev. on other gr. 9 N.Y. 2d 342) 35, 36
People v. Shapiro, 6 A.D. 2d 271, 177 N.Y.S. 2d 670 36
People v. Sikora (204 N.E. 2d 768, Ill. 1965) 37
People v. Tannenbaum 18 N.Y. 2d 268 .26, 30, 32, 34, 35, 36, 37, 38, 39, 40, 49, 50, 53, 57, 91, 104
People v. Williamson, 207 Cal. App. 2d 839 37
People ex rel. Alpha Portland Cement Company v. Knapp, 230 N.Y. 48 101
Petition of R., 56 F. Supp. 967 97
Petitions of F. G. and E. E. G., 137 F. Supp. 782—S.D.N.Y. 1956 98
Pierce v. Society of Sisters, 268 U.S. 310 55
Pierre v. United States, 319 U.S. 141 101
Poe v. Ullman, 367 U.S. 497 102
Prince v. Mass, 321 U.S. 158 ..... 50, 55, 61

Quantity of Copies of Books v. Kansas, 12 L.Ed. 809, 378 U.S. 205 44

PAGE

Rapouile v. United States, 165 F.2d 152 ..... 97, 98
Redrup-Austin-Gent, 386 U.S. 767 45
Roth v. United States (345 U.S. 476) ..27, 48, 52, 67, 74, 75, 90, 91, 92, 97
Rothowitz, In re, 175 Misc. 984 61

Scales v. United States, 367 U.S. 203 .....51, 58
Shelton v. Tucker, 364 U.S. 479 41
Smiley v. Kansas, 195 U.S. 447 101
Smith v. California, 361 U.S. 147 .....30, 31, 33, 34, 36, 37, 40, 93
Sprules v. Binford, 286 U.S. 374 93
Starr, In re, 245 A.D. 5 N.Y. 61
State v. Chabot, 106 NW 2d 286, Wisc. 1960, app. dism. 368 U.S. 15 37
State v. Jungclaus (126 NW 2d 858 Neb. 1964) 37
State v. Onerato, 199 A. 2d 715, Conn., 1963 36
State v. Settle, 156 A. 2d 821, R.I. 50
State v. Settle, 156 A. 2d 921 76
State v. Vollmar (389 SW 2d 207, Mo.) 36
Stromberg v. Calif., 283 U.S. 359 .....58, 107
St. Pierre v. U.S., 319 U.S. 41 95

Telegraph Company v. Texas, 105 U.S. 460 101
Thornhill v. Alabama, 310 U.S. 88 .....102, 103, 104, 105
Tileston v. Ullman, 318 U.S. 44 101
Trustee of Dartmouth College v. Woodward, 4 Wheaton 518 62

U.S. v. Flynn, 216 F. 2d 354, 2nd Cir. 65
U.S. v. Hochman, 277 F. 2d 631 36
U.S. v. Levine, 83 F. 2d 156, 2nd Cir. 50
U.S. v. Mesarosh, 203 F. 2d 449, 3rd Cir. 65
United States v. Alford, 274 U.S. 264 93
United States v. Francioso, 164 F.2d 163 98
United States v. Kahriger, 345 U.S. 22 92
United States v. Lightfoot, 228 F. 2d 861 (7th Cir.) 58

PAGE

United States v. Oakley, 290 F. 2d 517 cert. den. 368 U.S. 888 31
United States v. Pagen, 314 U.S. 513 93
United States v. Petrillo, 332 U.S. 1 ..... 92, 93
United States v. Raines, 362 U.S. 17 101
United States v. Schneiderman, 106 F. Supp. 906 .. 58

Valentine v. Chrestenson, 316 U.S. 52 53
Vasko, In re, 238 A.D 128, N. Y. 61

Waters-Pierce Oil Co. v. Texas, 212 U.S. 86 93
West Coast Hotel Corp. v. Parrish, 300 U.S. 379 ... 29, 45
Whitney v. California, 274 U.S. 357 58
Williams v. United States, 341 U.S. 494 101
Winters v. New York, 333 U.S. 507 ..... 102, 104
Womack v. U.S., 294 F. 2d 204 cert. den. 365 U.S. 859 (1961) 36

Yazoo v. Miss. V.R.R.V. Jackson, 226 U.S. 217 101

Statutes Cited

Constitution of the United States of America

First Amendment 13, 16, 17, 24, 25, 33, 48, 49 51, 53, 55, 56, 57, 58, 59, 60 61, 69, 71, 87, 102

Fourteenth Amendment 13, 16, 25, 48, 53 61, 69, 71, 85, 86 100

N.J. Rev. Stat. Section 2A:115-331 Supp. 1965 76

New York Code of Criminal Procedure Section 22a 41

PAGE

Penal Law of the State of New York (Chapter 327 of the Laws of 1965)

Section 484-e 19, 69, 75

Section 484-h 2, 3, 4, 12, 13, 14, 16, 17, 18, 19 20, 21, 22, 23, 24, 25, 26, 27, 28 29, 30, 31, 32, 33, 34, 37, 38, 40 43, 44, 47, 49, 50, 52, 53, 54, 56 57, 60, 62, 63, 64, 65, 68, 69, 75 80, 85, 86, 88, 89, 90, 91, 92, 94 95, 96, 97, 100, 101, 102, 103 104, 105, 106

Section 484-i 32, 33, 91, 92

28 U.S.C. 1257(2) 1

Other Authorities Cited

Alienation, Hedonism and Life Vision of Delinquents—"The Journal of Criminal Law", Criminology and Police Science", Vol. 58, No. 3, Sept. 1967, pp. 325, et seq. 73

American Law Institute's Model Penal Code, Section 207.10(2), tentative draft #6, 1957 95

Armstrong—The Damning Case Against Pornography, December 1965 Reader's Digest 131 77

Arthur Freund, 31 Am. Jud. Section 171 76

Can Reading Affect Delinquency? 16 Juvenile Court Judges Journal 67, 69-70 (summer, 1965) 77

Censorship and Obscenity, 66 Dickinson Law Rev. 421—1962 76

Constitution of the United States Annotated, Ed. by Edw. S. Corwen, Lib. of Congress 1953, p. 980 57

PAGE

Criminal Law Bulletin, Vol. 1, No. 8, Oct. 1965, pp. 28, et seq. 50

Essays in Political Theory, Presented to George Holland Sabine, Cornell University Press, The Clear and Present Danger Doctrine in Free Speech Cases by Robert E. Cushman 75

Foolish Fig Leaves? Pornography in-and-out of Court by Richard H. Kuh, Macmillan, 1967, pp. 10-13, 233-238 ..... 76, 77, 78, 99

Francis J. Connell, 154 Colum. L.R. 698 76

Freund—On Understanding The Supreme Court, 27-28 65

F.B.I. Law Enforcement Bulletin, January, 1960 .. 79

F. Wertham—Seduction of the Innocent 76

Gellhorn — Individual Freedom and Governmental Restraints, p. 55, note 9 92

Hall—Poison in Print and How to Get Rid of It, May 1964 Reader's Digest 77

Hearings on Juvenile Delinquency (obscene and pornographic materials) before Subcommittee to Investigate Juvenile Delinquency of the Senate Committee on the Judiciary, 84th Congress, 1st Sess., 217-21, 1955 ..... 76, 79

Hoffman—A Psychiatric View of Obscene Literature, 10 Bulletin of Guild of Catholic Psychiatrists 223 (1963) 77

Hoover—Combatting Juvenile Crime, The Role of the F.B.I., 25 U. Pitt. L.R. 469, 1964 76

January 1960 Federal Bureau of Investigation Law Enforcement Bulletin 77

PAGE

Justice Frankfurter and Civil Liberties, Clyde E. Jacobs, University of California Publications in Political Science, Vol. 12, pp. 106, 107 59

Justice Samuel H. Hofstadter and Shirley R. Levitton—No Glory, No Beauty, No Stars—Just Mud, New York State Bar Journal, April 1965, page 118 ..... 63, 69

Kilpatrick—The Smut Peddlers, 7-9 (1960) 77

Leo Pfeffer, Church, State and Freedom, p. 502 .. 59

Murphy—Censorship, Government and Obscenity, 1963 Senate Report, #2381, 84th Cong., 2d Sess., pp. 8-12, 62 76

Mussmano, Address, October 23, 1965, before the Citizens for Decent Literature Convention, New York City 77

New York Legislative Document No. 83 (1964) Report of the New York State Joint Legislative Committee to Study the Publication and Dissemination of Offensive and Obscene Material 77

New York State Bar Journal, April 1965, p. 117 80

Obscenity: Some Problems of Values and The Use of Experts, by John P. Frank, 41 Washington Law Review, pp. 631 et seq. 49, 52, 53

On Salacious Literature, A Statement by the New York Academy of Medicine, prepared by the Committee on Public Health, 39 Bulletin of the N.Y. Academy of Medicine, 2d Series 545, 1963 78

Patrick Wall, Lecturer on Criminal Procedures at New York University School of Law, Criminal Law Bulletin, Vol. I, No. 8, October 1965, p. 28 ... 91

Pitrim A. Sorokin—Demoralization of Youth; Open Germs and Hidden Viruses—Christianity Today, p. 3, July 6, 1959 77

PAGE

Preliminary Notes Toward a Study of Judicial Notice, E.F. Roberts, Cornell Quarterly, Vol. 52 No. 2, Winter I, 1967, pp. 210, 233-237 29

Report of Select Committee on Current Pornographic Materials, H.R. Rep. No. 2510, 82 Cong., 2d Sess., 107-108 76

Social Causation, by R. MacIver, pp. 93-95, 376, 378, 382-6, 392-3 ..... 84, 86

Society by MacIver and Page, p. 510, 626-8 84

Sorokin—The American Sex Revolution, 1956 76

Testimony at Hearings on Obscene Matter Sent Through the Mails, Subcommittee on Postal Operations of the House of Representatives Committee on Post Office and Civil Service, 86th Cong. 1st Sess. (1959) 77, 79

The State of the Social Sciences, ed. by L. White, pp. 9, 14, 15, 360 84

T.I. Emerson, Yale Law Journal, Vol. 72 No. 5, pp. 939, et seq. 50, 55, 58, 61, 66, 67, 81

Vol. XXXV, No. 4 Notre Dame Lawyer, p. 546 50

What Does the First Amendment Mean, Alexander Meikeljohn, Vol. 20, No. 3, University of Chicago Law Review, ff. 461 53

16 W. Res. L. Rev. 780 50

39 Bull. of New York Academy of Medicine, 2d Series, 545, 1963 76

39 S. Calif. Law Review, p. 347, Note 6 55

39 S. Calif. Law Rev. 371, 372 38

43 N.C.L. Rev. 172 50

PAGE

52 Ky. L.J. 429 50

69 Yale Law Journal, 141 50

78 Harvard Law Review, page 1202, section 7 53

112 Univ. of Pa. Law Rev. 834, 856 ..... 50, 92

1964 Wash. U.L.Q. 98 50

IN THE

Supreme Court of the United States

October Term, 1967

No. 47

SAM GINSBERG,

Appellant,

against

THE STATE OF NEW YORK,

Appellee.

ON APPEAL TO THE APPELLATE TERM OF THE SUPREME COURT OF THE STATE OF NEW YORK SECOND JUDICIAL DEPARTMENT

BRIEF FOR THE APPELLEE

Opinion Below

Neither the Trial Court nor the Appellate Term wrote an opinion, but the decision of the Trial Court, the District Court of Nassau County, First District, is set forth in the trial minutes (R. 247-250).

Jurisdiction

Appellant relies upon the jurisdictional provisions of 28 U.S.C. 1257 (2).

The Statute

The convictions here under review were obtained in a prosecution conducted pursuant to Section 484-h of the Penal Law of the State of New York enacted in Chapter 327 of the Laws of 1965. A copy of the statute is contained in the Appendix herein.

Questions Presented

1. Does a state infringe the free press guarantees of the First and Fourteenth Amendments where it acts under its plenary power as *parens patriae,* protector of the young, to proscribe, by legislative prohibition, the commercial distribution to children less than seventeen years of age of sex-oriented materials transgressing standards patterned on those articulated as tests of obscenity by this Court, but does not enact a ban on the non-commercial circulation to children of the materials comprehended within the statutory terms?

2. Even if it be assumed, *arguendo,* and contrary to fact, that Section 484-h is not an obscenity statute, is the social value to children of material designed primarily to arouse sexual excitement for commercial profit so great that, in the absence of universally accepted, scientifically certain knowledge of its precise effects on the young, which may never be available, or available too late, society must be rendered impotent to limit its commercial distribution to children and made to run the risk of the considerable damage which present knowledge indicates may well flow from it? Should this risk be run when it can be avoided simply by banning commercial distribution of such material to children until they reach seventeen years of age?

3. Even if Section 484-h were not an obscenity statute, which it is, does not the state's regulatory authority over children exceed the reach of the police power, owing to the added dimension of competence conferred under the *parens patriae* doctrine, and should it be restricted to the extent of the police power by rules, like clear and present danger, delimiting the outer boundaries of the police power's operation, or by presumptions, like the preferred position concept, against the validity of police power enactments regulating expression, especially where, as here, the expression in issue is more than mere speech? And, in any event, are not these tests satisfied and the presumptions rebutted in the present case?

4. Assuming, *arguendo,* and contrary to fact, that 484-h is not an obscenity statute, does Section 484-h constitute an unacceptable restraint on freedom of the press by virtue of its scienter provision and the responsibility of judgment it places on the book seller?

5. Is Section 484-h void for vagueness, where its wording was modelled on the phraseology employed by this Court in its definition of obscenity, or is its linguistic form sufficient in statement to satisfy the minimum requirements of due process?

6. May the appellant challenge Section 484-h as invalid on its face?

Statement

The prosecution here involved was initiated on October 27, 1965, by an Information in two counts filed in the District Court of Nassau County, First District, charging the defendant with selling to Richard Lance Corey, sixteen years of age, on October 18th, 1965, two magazines entitled "Mr. Annual", Fall, 1965 issue, and "Sir", December,

1965 issue in violation of Section 484-h of the Penal Law. Count One charged the sale of these magazines in violation of subdivision 2 (a) of Section 484-h and Count Two charged that the said magazines violated subdivision 2 (b) (R. 2, 3, 4).

The Information charged that the magazines contained pictures of persons and portions of the human body which depict nudity and which are harmful to minors.

On October 28, 1965, another Information was filed in the same Court against the same defendant accusing him in two counts of the same types of violations in that he sold on October 26th, 1965, to the same Richard Lance Corey two magazines entitled "Man to Man", January, 1966 issue and "Escapade", December, 1965 issue (R. 4, 5).

The case was tried on April 18, 19 and 20, 1966, before District Court Judge Julius Chinman, sitting without a jury, and the defendant was found guilty of the charges (R. 248-249). He was given a suspended sentence.

The Evidence

The appellant has not challenged the sufficiency of the proof adduced at the trial to sustain the charges herein, relying instead upon constitutional objections to Section 484-h of the Penal Law of the State of New York, the statute under which the appellant was prosecuted. However, it is respectfully submitted that the proof presented by The People at the trial of this case was more than sufficient to sustain the charges brought against defendant-appellant and to refute appellant's argument that the scienter provision of 484-h imposes such a heavy burden of inspection and judgment on the magazine seller as to result in self-censorship.

Summary of the Evidence at the Trial

Testimony of Richard Lance Corey

Richard Lance Corey testified: that he was sixteen years of age at the time of the incidents alleged in the Informations (R. 20); that on October 18, 1965 he visited defendant's luncheonette, which he had visited fifty times before, including "five times, seven times" in October, 1965 (R. 21); that Sam, the defendant, was behind the counter and Corey picked two magazines from the magazine rack and went up to the counter and paid the defendant money for the magazines (R. 22, 28); that the counter was situated almost directly across from the magazine rack (R. 23); that he put his initials on the magazines he purchased and the two magazines shown to him in court had his initials on them and were the ones he had bought (R. 26); that when he brought the magazines to the counter, defendant Ginsberg looked down at the magazines (R. 29), both of them (R. 30), and told Corey how much they cost (R. 29); that Corey paid "$1.50, $1.60" for the magazines (R. 28); that Corey held the magazines in an off center manner so the prices of both showed (R. 30); the witness then identified the defendant in the court room as the man who sold him the magazines (R. 30, 31); the two magazines, "Sir" and "Mr. Annual" were received in evidence (R. 33); Corey further testified that on October 26, 1965, he returned to defendant's luncheonette with two detectives (R. 33); that he picked out two magazines and went up to defendant, who was behind the counter, and, while standing two feet away from him (R. 34), asked him how much the magazines cost (R. 33); that he paid $1.50 or $2.00, at the most, for the magazines, and the magazines showed to him in Court, "Escapade" and "Man to Man" were the ones he had bought on that occasion (R. 34); that at the time of this purchase the defendant said to him "Hi Lance" (R. 35); that Corey's initials were on these two magazines (R. 36); the two magazines were received in evidence

(R. 37); Corey also testified that he had purchased, prior to October 18th, other issues of these same magazines from the defendant (R. 63); that on the 11th or 12th of October, Corey had told defendant to take the magazines behind the rack or put them behind the counter because that way defendant wouldn't get into trouble with the law, and defendant had told him it wasn't his business and started telling him and his girl friend a story about Adam and Eve (R. 64, 65, 66); that during that conversation Corey had told defendant that he was sixteen years of age (R. 65, 66); that Corey's mother had found the magazines he bought before October 18th (R. 68).

Testimony of complainant, Mary Corey

Mary Corey testified: that she was the mother of Richard Lance Corey and he was born September 11, 1949 (R. 71); that prior to October 18th (R. 75) and in October, 1965, she visited defendant's luncheonette and after looking through magazines in the magazine rack and seeing "Sir" and "Mr. Annual", displayed, she told him that he had a "wide range of pornography", that she was "Lance Corey's mother", that he had sold her son magazines when he was fifteen years old and Lance had just turned sixteen (R. 73, 74); that a woman she presumed to be an employee in the luncheonette heard her conversation with the defendant and started berating her and said that if her son were brought up properly he would not be looking for these magazines (R. 74); that Mrs. Corey told defendant that he had the magazines out in the open and would probably sell them to her six year old child, and defendant told her it was no concern of hers "how old anyone is, if he wants to buy a magazine, he may purchase it" (R. 74); that defendant knew her son by the name of Lance (R. 78); that she said to defendant on the occasion of her conversation with him before October 18th that "you sold my son Lance these filthy magazines when he was still fifteen years old. He just turned sixteen a few weeks ago" (R. 79).

Testimony of Detective Sgt. Daniel Groh

Sgt. Groh testified that on October 26th he went to defendant's luncheonette, and two minutes later Richard Corey walked in, and the defendant said "Hello, Lance" (R. 90); that Corey picked out some magazines, went to the defendant and held up the magazines; defendant looked at them, accepted money from Corey and gave him change; that Sgt. Groh could see the covers of the magazines as they were being paid for (R. 90); he indicated that the magazines held by Corey were spread in his hand like a poker hand (R. 92).

Testimony of the Defendant

The defendant testified that he carried between 175 and 200 types of magazines in his store (R. 157); that he did not know Richard Corey as Lance Corey until defendant was served with the warrant, and he had never called him "Lance" (R. 162); that Corey never bought magazines from him on October 18th or prior to October 26th, and that Corey never stated his age or told him he should not sell Girlie magazines or should remove them from the rack (R. 163); that Corey bought two magazines from him on October 26th and handed him $1.20 for them, but he did not see the names or type of the magazines because Corey held them folded under his armpit (R. 165, 166); that only he, Corey and Sgt. Groh were in the luncheonette at that time (R. 207); that before October 18th Corey came in to his luncheonette quite often (R. 201) and quite a number of times in the summer of 1965, but he doesn't remember Corey buying a magazine (R. 170); that "before all this happened" Mrs. Corey came into his luncheonette and said in a very loud voice "I don't want you to sell any of these books to my son . . . I don't like the magazines or books that you have in here" (R. 179); that Mrs. Corey then had a discussion with defendant's wife and was shouting (R. 179).

Defendant then proceeded to show his extensive knowledge of the magazines he offered for sale and the Girlie magazines here involved in the following question-answer exchanges on cross-examination:

At pages 182-183:

"Q. How many magazines would you say sell for in excess of sixty cents? A. Might be 10 to 15 types.

Q. 10 to 15 types sell for more than sixty cents? A. Yes.

Q. I think, if I recall, how many magazines in your store sell for sixty cents and you began to name magazines? [fol. 285] A. Yes.

Q. This is based upon your recollection of the magazines? A. From memory.

Q. The answer that you gave on direct examination with regard to the price and types of magazines were based upon your recollection; is that right? A. Right.

Q. As I recall, you named as one of the magazines Car Model, which sells for sixty cents; is that correct. A. I think it's Road and Track. It's either Car or Car Model. One of them sells for 50 and one of them sells for 60, I think.

Q. You are not certain then as to the price of magazines; is that right? A. I am, but it's a Car, Car Model. I think Car Model sells for 50 and Car sells for 60.

Q. Now, with regard to the sizes of these magazines. You are familiar with the magazines Escapade, Sir, Mr. Annual and Man to Man; is that correct? A. Yes.

Q. Now, these magazines have a specific size and shape; [fol. 286] is that right? A. More or less, yes.

Q. As a matter of fact, they are all similar in size and shape; is that right? A. Right."

At page 185:

"Q. Let me ask you this, Mr. Ginsberg. Are you aware of the content of Escapade, Sir, and Man to Man? A. Yes, sir.

Q. Are you aware of the content of Mr. Annual? [fol. 290] A. Yes, sir.

Q. Can you tell me and the Court, can you tell the Court what that content is? A. It's a magazine Call Girl Annual or whatever you mentioned. It's a name of a magazine.

Q. Mr. Ginsberg, do you understand the word 'content'? A. What it contains.".

At pages 186-187:

"Q. Can you tell me first what the content of the magazine Escapade is? A. It's photographs of girls and stories.

Q. Photographs of girls and stories. Can you tell me with regard to the photographs of the girls, how they appear in the magazine? A. They appear in nude fashions. They appear in different types of dress and different types of appearance.

Q. Would you say predominantly that the magazine contains pictures of female nudes? A. Yes and no.

Q. Mr. Ginsberg, would you say that the magazine Escapade contains pictures of females with the entire breast exposed? A. Yes, they are.

Q. Would you say that the magazine Escapade contains [fol. 292] pictures of females with their entire buttocks exposed?

* * * *

(Question read back)

A. Yes.

At page 189:

"Q. Do you read the magazine Escapade? A. No.

Q. But you are aware of the content of the magazine? A. Yes.

Q. You have a—you had several magazines, 175 to 200 different varieties of magazines in your store; is that correct? A. That's right.

Q. During that period of time were you aware of the content of the magazines in your store? [fol. 297] A. Yes."

At page 196:

"Q. Answer this for the Court, Mr. Ginsberg. You are aware of the fact that you deal or have on your shelves what is known commonly as 'girly' magazines? A. Girly magazines?

Q. Magazines of female nudes? A. Yes.

Q. You are aware of the fact that these things are in [fol. 308] your store, right? A. Right."

At page 197:

"Q. So that can we—is it fair to assume, Mr. Ginsberg or would it be unfair to assume that these magazines are sold in the course of your business? A. Yes. They are.

Q. They are sold in the course of your business?

A. Yes."

At page 198:

"Q. Now, Mr. Ginsberg, in the course of conducting your business, you sold these magazines; have you not? A. Yes.

Q. As a matter of fact, upon selling these magazines, you have not inquired of the person how old they were, have you? A. Yes. There are times I ask them or if I see somebody reading any of the girly magazines, I tell them to move away from the rack and get somewheres else. When I have the time and am not that busy."

At page 209:

"Q. Have you read these magazines, Sir, Escapade, Man to Man, Mr. Annual and Sir? A. At a glance you read them. We don't—

The Court: (Interposing) Read the answer to that question.

(Answer read back.)

The Court: Now, Mr. Ginsberg, I am going to show you something. I show you People's Exhibit number 1 in evidence, which is a picture

of the book rack in your store. Now, I particularly call your attention to the third column of magazines from the right of the picture. Do you see the column?

[fol. 329] The Witness: Yes.

The Court: What is the top magazine on that rack?

The Witness: Escapade.

The Court: Now, I think that you told Mr. Rivers on cross-examination that Escapade was a girly magazine?

The Witness: Yes.

The Court: You told him as a girly magazine it contained pictures that you were aware of with bare breasts and bare buttocks?''

At page 210:

''The Witness: Yes.

The Court: I want you to look down that column and tell me if you see any other magazines down there that conform to the type of magazines known as girly magazines?

The Witness: They all do.

The Court: Every one in that column?

The Witness: Except this one here.

The Court: Which one? What is the name of it?

The Witness: 'Mad.'

The Court: That is not a girly magazine?

The Witness: No.

The Court: Tell me the names of the ones that are girly magazines?

[fol. 330] The Witness: Millionaire, Man to Man, Topper, Gem, Men's Digest, Jaguar, Gent.

The Court: Now, you say they are girly magazines. You put these magazines in the rack, did you not?

The Witness: Yes.

The Court: 'Now, either in the process of putting them in the rack or taking them out of the rack, did you become aware of the content of these magazines so you could designate them as 'girly magazines?'

The Witness: Yes.''

Defendant further testified that his store had a large teenage clientele (R. 207). Defendant showed that he was aware before October 18th that Corey might be under seventeen years old in the following testimony at page 207:

> "Q. There was nobody in the store but yourself, Detective Groh and Lance Corey; is that right? A. Right.
>
> Q. Nobody else came in during that period that he was there, right? A. Right.
>
> Q. Let me ask you this. From time to time, during this two years and four months that you owned this candy store, it has been frequented by teenagers; is that not right? A. Youngsters. Very fine youngsters.
>
> Q. How many youngsters would you say come in? A. Quite a few.
>
> Q. You had occasion to observe these quite a few youngsters; is that right? A. Yes.
>
> Q. You had occasion to form opinions as to their age and age group; is that not right? A. Yes.
>
> Q. Let me ask you this. What age group does Lance Corey fall into? A. It's all ages.
>
> Q. Based upon your observation of him? A. The way he is dressed at times, he could be 17 or 18 or he could be 15."

Defendant gave no testimony to the effect that he refrained from sales to adults or to children for fear of violating Section 484-h.

Testimony of Detective Albert Anderson on Rebuttal

Detective Albert Anderson testified that on October 26th he observed Richard Lance Corey purchasing the magazines from defendant, and as Corey gave money to Ginsberg, Anderson could see a picture of a nude woman on the cover of a magazine that Corey held in his hand (R. 231); this magazine was Escapade, the very same magazine which was Exhibit 4 in evidence; that he had placed his initials on the magazine and had Corey do the same; he then identified the magazine in evidence Man to Man as the second magazine bought by Corey on October 26th (R. 232).

Summary of Argument

Section 484-h does not establish a total ban on the distribution of materials within the reach of its prohibition; it enjoins only distribution for a monetary consideration to children under seventeen years of age. Thus, in addition to being an expression of the public policy of the state, it is also an auxiliary to the enforcement of parental discretion as to whether or not such materials are suitable for children. In addition, Section 484-h may aid the parent to keep from the child sensational material calculated to arrest his attention and to distract it from scholastic duties such as after-school homework.

Since a parent's discretion with respect to the upbringing of his child is not confined in its operation by the limitations of the First and Fourteenth Amendments, it follows that a statute enacted under the state's plenary competence as *parens patriae* which assists the effective exercise of that discretion is similarly unburdened by such limitations.

Section 484-h is a children's obscenity statute validly based upon the variable obscenity concept. It bans commercial distribution to children of materials obscene as to children. It has been so characterized by the highest Court of the State of New York in the Broderick case and that characterization will be accepted by this Court. Broderick rests upon the conceptual foundation of this Court's variable obscenity approach in the *Mishkin* case. Section 484-h incorporates the definition of obscenity approved by this Court in its obscenity decisions with the slight phraseological adjustments necessary to limit the definitional reach to materials obscene when distributed to children. Teenagers are an audience or recipient group for Girlie magazines within the variable obscenity doctrine of Mishkin.

The scienter provision of 484-h does not have the indirect effect of restricting distribution to adults of materials obscene as to children but not obscene as to adults.

Dealers will not refrain from sales to adults for fear of violating 484-h, because adults may be distinguished easily from children under seventeen years and reasonable inquiry as to age will suffice to protect the dealer under the statute's honest mistake provision.

Also, a quick glance at the publication will reveal its nature.

The only persons to whom dealers might, allegedly, be hesitant to sell in the absence of an honest mistake provision are youngsters so close to the statute's age limit that they have a lower order of First Amendment rights than adults. Suppression of distribution to such youngsters is thus more easily justified under the balance of interests test, in view of the overbalancing weight of the state's interests in child welfare and parental control.

It should also be noted that youngsters in this marginal age group *could have been included* in the prohibition set out in 484-h without giving constitutional offense.

The scienter requirement of Section 484-h does not ordain strict or absolute liability and it does not impose an unconstitutionally heavy burden of inspection and judgment on the dealer. It is not a ground for constitutional objection that an obscenity statute places the same burden of judgment on the book dealer that it rests upon the publisher.

The dealer, in unpacking and displaying his magazines and books, and in his normal day to day acquaintance with them, soon becomes familiar with their character (R210). Indeed, most magazines and sex-oriented books reveal their character from their covers, titles and prices, and the various Girlie magazines are well known. In the rare case of doubt, a quick leafing through the magazine or book will suffice to disclose its nature. A dealer may simplify his system of administration by establishing a special rack or shelf for adults only.

This Court has required a showing of scienter only as to contents; it has never demanded proof of scienter as to age or placed the prosecution under the impossible obligation of demonstrating that the dealer knew the distributed materials were obscene.

A statute may properly rest the burden of judgment on the bookseller or dealer. The obscenity criteria of 484-h were approved by this Court in its obscenity decisions and, thus, are sufficiently definite in statement fairly to apprise a dealer of what materials he must refrain from selling to children. It follows that this Court has, in effect, approved a policy of compelling the bookseller to sustain the burden of judgment as to what materials are salable.

This Court, in *Smith* v. *California,* simply outlawed obscenity statutes dispensing completely with proof of scienter. It did not demand a showing that the offending distributor had acquaintance with the specific contents of the materials distributed, and this Court's pronouncements in Smith and Mishkin suggest its willingness to accept a lesser degree of demonstration which indicates the distributor's awareness of the nature of the materials in question. Decisions of lower federal courts and state courts are in accord in their acceptance of the doctrine that scienter may be inferred from knowledge of circumstances which suggest the nature of the material in question.

A more onerous scienter requirement would make it impossible to enforce the state's public policy against obscenity through the agency of law.

The present method of obscenity enforcement by criminal prosecution is not overly restrictive of free expression. On the contrary, civil libertarians might argue that the suggested procedure of requiring the prosecutor to obtain a prior civil adjudication of obscenity against the publisher as a precondition to prosecuting the bookseller might exert a greater restraining effect on free circulation of literary

and pictorial matter, although doubtless a procedure for civil adjudication would be constitutional.

This Court's decision in this case will give book dealers guidance as to the character of Girlie magazines and will relieve them to some extent of the burden of judgment sought to be avoided by the suggested preliminary civil adjudication.

It is not clear that the civil remedy will enhance the circulation of protected pictorial and literary materials, and, therefore, it can hardly be said that it is mandated by the Fourteenth Amendment.

The public display of the Girlie magazines to children in this case brings it within the purview of the Ginzberg pandering rule, notwithstanding this Court's recent holding in the different fact context of the *Redrup-Austin-Gent* case.

The definition of what is harmful to children in terms of the standards in the adult community with regard to this subject is constitutionally permissible. This approach is consistent with the law's general policy of removing all matters concerning the health and well being of the young from the control of immature judgment. The animating principle of Section 484-h derives corroboration from a recognition of the fact that child-like curiosity and youthful hospitality to the novel cannot be made the determinant of acceptability. Under such a regime, no materials would be barred from circulation.

Appellant cannot raise First Amendment objections to the prohibition in Section 484-h against commercial distribution to children, since that section is a child's obscenity law, and obscene materials are not within the protection of the First and Fourteenth Amendments.

Even if 484-h were not an obscenity statute, it would still be constitutionally acceptable despite its restraining

effect on the flow of expression to children. It has been recognized by this Court, as well as other authorities, that government may bar the dissemination to children of material constitutionally protected from suppression in an adult setting, and that the state's power over children exceeds its regulatory competence with respect to the affairs of adults.

Even if it were not an obscenity law, the statute's constitutionality would be vindicated by the balancing test, because materials within the statutory criteria have no social importance and rank low on the constitutional scale of values and the health, morals and welfare of the young are interests of great weight, indeed, of overriding importance. Thus, even if 484-h caused some indirect restraint on the circulation of expressionary materials to adults, it would not be fatally infirm. And even if children may be said to have First Amendment rights which are operative in this context, they are a lower order of rights than those enjoyed by adults. Also, the First Amendment claims of dealers are of less weight on the constitutional scale when they involve distribution to children. It follows that the suppression of such interests of lesser magnitude is justified by the greater freedom it confers upon parents to determine the conditions of youthful moral development.

Even if Section 484-h were not an obscenity law, the clear and present danger test would not be applicable. That test has lost its vitality. Moreover, the facts of this case bring it within the category of the "more than mere speech" exception to the clear and present danger rule which was formulated by this Court in the picketing cases. Like picketing, the Girlie magazines in issue, and other materials within the prohibition of 484-h, convey more than mere information. They have an extra ingredient of incitation or coercive stimulation, a non-rational element which makes its impact at a psychic level below the cognitive. They energize the neural apparatus to a sensual response without the mediation of conscious thought, just as picket-

ing, by its inherent coercive force, compels obedience by reflex rather than reflection.

The state's authority over children exceeds the reach of the police power and should not be confined to the extent of the police power by tests delimiting the outer boundaries of the police power's operation or burdened by presumptions against the propriety of the police power's exercise.

In discharging its awesome duty to protect the young, the state should be permitted to err on the side of precautionary over-regulation.

The clear and present danger rule is simply irrelevent to a determination of whether certain expressionary materials will affect youthful morals, since the moral consequences of expression are not clear and present, but rather are nurtured over time, and usually are not manifested in immediate and dramatic reactions to corrupting or conditioning influences.

Even if the clear and present danger test were applicable, it is now a delayed reaction test and does not require a showing of imminent danger. Under the decisions relaxing this rule, long-run risk is justification for legislative action. The clear and present danger rule has been satisfied in this case.

Section 484-h does not aim at preventing sinful thoughts; it may be justified on the secular, utilitarian grounds that it tends to prevent such evils as teenage illegitimacy, sexual license and the breakdown of the family. That it aims at such objectives may be seen from a reading of the legislative finding and purposes in Section 484-e, the companion provision to 484-h.

A state may limit the distribution of sex-oriented materials to children in order to protect the moral foundations and the social and psychological conditions of its own viability. A regime of youthful sexual permissiveness tends

to produce a character-type which views life in terms of hedonistic self-indulgence rather than self-discipline and moral responsibility. Since a free society demands, for its continued vitality, the predominance of the latter type, the state must be permitted to exercise control over forces influencing character formation. This dimension of competence is peculiarly important in this era, in which the family has suffered a waning of vigor as a countervailing influence on character.

Laws requiring the education of children beyond the necessities of vocational competence are based on similar moral values.

This view is consistent with democratic theory. That theory affirms the concept of individual freedom of choice, but it does not require that society stand impotent against corrupting agencies which would pervert that freedom by arresting the development of the moral actors invoking it, thereby limiting their ability to use it effectively.

Barbarization of moral tone leads to institutional decline and is properly within the ambit of legislative concern.

A legislative finding of danger, such as that in § 484-e, should be respected, as the decisions of this Court have held.

This legislative finding that the materials prohibited by 484-h lead to youthful crime and immorality, is supported by considerable expert authority, and legislation need not wait upon scientific certainty, in view of the fact that not all legislation is founded on scientific proof, and since it is often difficult to determine or measure "cause" in the realm of social affairs. Those who demand "scientific" proof of causation may be demanding the impossible. Constitutional adjudication must be content with a lower order of demonstration, lest it bind public policy in servitude to the unrealistic expectancies of a naive epistemology.

It is dangerous to hold that the community cannot preserve itself by reasonable precautions on the basis of exist-

ing knowledge or to insist that the process of public protection must gear itself to the uncertain rhythms and leisurely devlopment of scientific progress. Knowledge in the social sciences will always be incomplete and imperfect.

Section 484-h could have exercised its regulatory effect constitutionally even if it were not an obscenity law, and it follows that the question of whether the state's proof satisfies the obscenity criteria of § 484-h is an issue of state law and not a matter of federal concern.

The doctrinal underpinning of this prosecution is consistent with the extreme libertarian philosophy of the First Amendment, since that philosophy opposes the suppression of speech where it may be dealt with instead by the counterforce of rational criticism. However, the effect of erotic materials on teenagers is so exciting that reason is atomized or deflected into inactivity. Thus, the classic argument against regulation is not pertinent in this context.

Section 484-h is not a prior restraint. It is not a futile remedy simply because parents may furnish to their children materials which may not be sold directly to them. This remedy helps to ensure that parents, and not children, will make the decision as to youthful access. Certainly many parents will welcome any assistance which will enable them to keep sex-oriented materials out of the hands of their children.

Section 484-h will not prevent the distribution of great literature. Its obscenity criteria, e.g., social importance, patent offensiveness, and prurient interest, except such works from its ban.

Section 484-h is not void for vagueness since it incorporates the obscenity criteria approved by this Court with the slight adjustments of phraseology needed to relate them to minors. This Court has held that the Constitution does not require impossible standards of precision in crim-

inal statutes and it has often approved statutory formulas where a more exact wording would embarrass the practical administration of the law in question. It has shown special indulgence with respect to obscenity laws, because it recognizes the difficulty of precise draftsmanship in this area.

The statutory terms "reasonable attempt", "knowingly", "shameful", "morbid" and "prevailing standards in the adult community" are not intolerably vague. The phrase "reasonable attempt" and the statutory definitions of "knowingly" are really variations of the familiar and accepted "reasonable ground to believe" and "reasonable man" standards. The words "shameful" and "morbid" are synonymous with "prurient", and, even if they were not, an objection to them on grounds of indefiniteness would raise a moot question since the trial court found that the magazines in issue appealed to prurient interest (R. 249). The highest court of New York State, having pronounced 484-h an obscenity statute, would seem to have held, in effect, that the terms "prurient", "shameful" and "morbid" are interchangeable, and this Court, in the *Mishkin* case, held that it would accept such a characterization by this state's high court.

The argument that the statutory term "prevailing standards in the adult community" is vague because it does not specify which community is meant, overlooks the fact that the same charge could be brought against this Court's similar formulation in its obscenity decisions, there being an absence of complete agreement in the Court as to whether the standard is or is not a national one. However, such a formula as is here in issue was approved by this Court in *Roth* and that would seem to foreclose appellant's claim in this regard.

The same rejoinder may be made to the argument that the prurient interest test of 484-h is indefinite in that it

does not designate the age group whose prurient interest shall furnish the standard for decision.

This argument is really a variant of the just discussed claim that the community standards test is vague. Similar criticisms have been leveled against the adult obscenity standards promulgated by this Court. Even if the adult community envisaged by this court were national in scope it would still be made up of adults of different social and economic ranks, educational levels, religions, occupations, etc. The same diversity would pertain where it was sought to apply the "patent offensiveness" criterion. However, this court has approved these formulas, nonetheless.

Appellant is mistaken in his assertion that depiction of an "ardent kiss or embrace" may be actionable under 484-h. The obscenity-type criteria set forth in the statute, including the patent offensiveness test, rule out such a possibility, owing to the fact that the kiss or embrace would not come within any of the elements of the tri-partite obscenity standard.

Appellant cannot challenge 484-h as void on its face or obtain a general declaration of its invalidity since that statute was not applied unconstitutionally as to him. A different rule, the so-called Thornhill rule, has been announced in free speech cases involving direct restraints on expression, but 484-h is an obscenity statute and the materials it proscribes are not within the protection of free expression guarantees. So far as the statute's indirect effect is concerned, this situation may be distinguished from that in *Smith* v. *California,* where the statute in issue was an adult obscenity law. This Court's holding in the *Mishkin* case would seem to support the view here urged that the "indirect restraint" or scienter argument may not be employed to challenge the general validity of a statute in a prosecution in which sufficient proof of scienter has been given. It is urged that in view of the overriding importance

of child welfare, the Thornhill rule should not be applied in a context such as this, even if 484-h were not an obscenity law.

The evidence adduced at the trial was sufficient to prove the defendant's guilt.

ARGUMENT

The statute is not an unconstitutional restraint on free expression.

POINT I

Section 484-h does not enact a total prohibition on the circulation of materials within the purview of the statute. The section merely enacts a ban on commercial distribution to children, thus serving to enforce parental control as well as the public policy of the state.

It should be noted that Section 484-h, which was in effect until September 1, 1967, does not establish a complete ban on the dissemination to children of materials within the ambit of its penalty (although, if it did, it would still be congruent with reigning constitutional principles). The section enjoins only commercial distribution to children, i.e., sale, loan or exhibition for a monetary consideration; it does not reach other forms of distribution. Thus, in addition to being an expression of the public policy of the state, it is also an auxiliary to the enforcement of parental discretion, which might be set at naught in the absence of restrictions barring children from commercial access to sexual materials. Section 484-h also may aid the parent to keep from the child sensational material calculated to arrest his attention and to distract it from scholastic duties such as after-school homework.

A parent may furnish such materials to his child, but the provision of commercial access outside the knowledge or presence of the parent may nullify his power of parental decision.

From this perspective, it may be seen that 484-h is not only an expression of the state's plenary power over child welfare; it is also an aid-to-parents law rather than a suppression law.

It can hardly be doubted that the immemorial power of the parent over his minor offspring includes supervisory authority over the use of his free time, his sexual, moral, intellectual and emotional development and the shaping influences, literary, artistic, sexual and social, which may condition that development. This parental competence is not subject to the limitations of the First and Fourteenth Amendments, and it follows that these constitutional provisions give no right to the child to assert his own preferences in derogation of parental imperatives.

The enforcement of 484-h assists the exercise of a parental control which is unlimited by First Amendment guarantees, and, therefore, 484-h cannot be considered objectionable as offensive to those guarantees. The legislature, which enacted 484-h in its potent capacity as *parens patriae,* must be viewed as representing the general parental will of its constituency. That small minority of parents who favor an approach contrary to that exhibited in 484-h are free to obtain for their children materials comprehended within the statutory injunction against direct commercial distribution to children.

Of course, the state's power as *parens patriae* is not limited to the scope of the individual parental power. Its distinct plane of jurisdiction, partaking of the quality of sovereignty, transcends such species of individual authority. When acting as *parens patriae*, it vindicates the paramountcy of the communal interest in the healthy develop-

ment of the young. It is under this overriding competence that, for example, it removes disadvantaged children from the custody of unfit parents and exercises those extensive incidents of control which are denied to it in the regulation of adult behaviour. It is in this same superior status that it has, in Section 484-h, flatly prohibted the sale of sex oriented materials for monetary consideration to children and no distinction is made in the law on the basis of whether, at the time of such sale, the child is alone or accompanied by an adult.

From its superintending vantage point, the state may choose to enact forms of legislative restriction which confirm and assist the parental function. The state may rely on an existing social institution as well as on governmental machinery to achieve its objectives, especially where that institution, like the family, has traditionally borne a significant burden of service with respect to the responsibility in question.

POINT II

A State may enact a statutory prohibition against the commercial distribution to children of materials obscene as to them.

A. Section 484-h is validly based on the variable obscenity concept.

Appellant contends that Section 484-h of the Penal Law of the State of New York inhibits freedom of expression in violation of the First and Fourteenth Amendments of the United States Constitution. It would appear that appellant is interposing a challenge to the statute in question as invalid on its face. He argues, in effect, that a statute prohibiting the dissemination to children of printed and photographic material *which is not obscene by adult standards is not within the power of the legislature* and that Section 484-h of the Penal Law is unconstitutional as an attempt to

regulate an area of expression which is free from any restraint by the State.

This Court, in *Jacobellis* v. *Ohio,* 378 U.S., 184, 195, expressed a view directly contrary to appellant's contention. Mr. Justice Brennan, in his majority opinion, stated:

> "We recognize the legitimate and indeed exigent interest of states and localities throughout the Nation in preventing the dissemination of material deemed harmful to children. But that interest does not justify a total suppression of such material, the effect of which would be to reduce the adult population * * * to reading only what is fit for children. *Butler* v. *Michigan,* 352 U. S. 380, 383, 1 L. ed. 2d 412, 414, 77 S. Ct. 524. State and local authorities might well consider whether their objectives in this area would be better served by laws aimed specifically at preventing distribution of objectionable material to children, rather than at totally prohibiting its dissemination."

Section 484-h was New York's reasonable response to Mr. Justice Brennan's suggestion.

The same contention as that advanced by appellant was rejected by the New York Court of Appeals in *Bookcase, Inc.* v. *Broderick,* 18 N. Y. 2d 71, wherein the constitutionality of 484-h was upheld. The Court of Appeals in *Broderick* disapproved this argument and the doctrine of absolute obscenity on which it was based. It interpreted the statute as banning the distribution of material obscene as to minors, as it did again in *People* v. *Tannenbaum,* 18 N. Y. 2d 268. Citing *Mishkin* v. *New York,* 383 U. S. 502, the Broderick Court, in effect, disagreed with the absolutistic interpretation of the *Roth* rule as enforcing an unvarying concept of obscenity based upon the "average person" test.

Refusing to accept a mode of adjudication which defines obscenity in a vacuum and with the semantic fixity of an absolute, unchanging idea, it sanctioned instead the notion

of variable obscenity, which rested upon the premise that the nature of the material in question was to depend upon its prurient appeal not for the "average person" but for its recipient group.

This Court will accept the New York Court of Appeals' interpretation of 484-h as an obscenity statute (*Mishkin* v. *New York*, 383 U. S. 502, 506).

The New York Court of Appeals was surely right when it concluded that 484-h was an obscenity statute. The provisions in subdivisions 1-(f) and 2-(b) of 484-h, enumerating the elements of criminality, incorporate the criteria approved by this Court in *Roth* v. *United States* (345 U.S. 476), *Jacobellis* v. *Ohio* (378 U.S. 184, 195) and *A Book Named John Cleland's Memoirs etc.* v. *Attorney General* (383 U.S. 413, 418), the *Fanny Hill* case, in virtually the identical language employed by these decisions in defining the concept "obscenity", with the slight but necessary adjustments of phraseology needed to relate these formulations to the subject of minors.

It seems difficult to conceive how statutory wording designed to deal with minors could come any closer to the phraseology of these Supreme Court cases. The tests of predominant appeal, taken as a whole, prurient interest, redeeming social importance, patent offensiveness and community standards are all set forth in Section 484-h.

The doctrine of variable obscenity enunciated by the Court of Appeals in *Broderick* rests upon the theoretical underpinning of *Mishkin* v. *United States*.

Mishkin and *Broderick* indicate that obscenity is to be ascertained contextually rather than conceptually, *i.e.*, by reference to the statutorily-protected class or the recipient group rather than by a purely analytic exercise in vacuo.

Building upon the conceptual foundation of *Mishkin* and earlier cases, the Court of Appeals in *Broderick* held in 18 NY 2d at page 75:

> "The clear implication of these cases is that material which is protected for distribution to adults is not necessarily constitutionally protected from restriction upon its dissemination to children. In other words, *the concept of obscenity* or of unprotected matter *may vary according to the group* to whom the questionable material is directed *or from whom it is quarantined*". (Emphasis supplied.)

The last quoted phrase being in the disjunctive, it is the plain intendment of *Broderick* that a person selling to children material objectionable under the criteria of 484-h is punishable even where that material was not designed for distribution to children, as indeed it was not in *Broderick*, because children are a "group from whom it is quarantined".

Again at page 76 of the *Broderick* opinion, the doctrinal essence of the Court's decision is restated:

> "It is clear that there is no such thing as 'obscenity in the air' that is, obscene matter does not exist in a vacuum but can be found only *by reference* either *to the group* to whom the matter is directed or *from whom it is barred*". (Emphasis supplied.)

It is respectfully submitted that the above statements of the Court of Appeals properly interpret this Court's holding in *Mishkin*, and completely dispose of appellant's argument that because the material in question was *not designed for children*, within the meaning of the Mishkin rule, its seller is not punishable under 484-h. In view of the fact that children are the "group from whom it is quarantined" and "the group from whom it is barred", a sale to a child is criminally actionable even if the material in question was designed for adults.

Moreover, it is a fact so well known as to be eligible for judicial notice that children in their early and middle teens are a major market for the type of "Girlie" magazines involved in this case and appellant's claim that these

magazines are not directed to such a market is misleading. The crowd of teenagers around the Girlie magazine rack is a familiar sight in candy and stationery stores throughout the country.

The Girlie magazines are designed for those groups who are known to buy them, and this Court could take judicial notice (see *Burns Baking Co.* v. *Bryan*, 264 U.S. 504, 516, 517; *Hawkins* v. *United States*, 358 U.S. 74, 81-83; *Mugler* v. *Kansas*, 123 U.S. 623. *West Coast Hotel Corp.* v. *Parrish*, 300 U.S. 379. *Muller* v. *Oregon*, 208 U.S. 412; *Brown* v. *Board of Education*, 347 U.S. 483, 494, n. 11; concurring opinion by Judge Traynor in *Escola* v. *Coca Cola Bottling Co.*, 150 P. 2d 436, Calif.) that no group is more interested in them and more disposed to purchase them than teenagers, even if this knowledge were conventional wisdom rather than indisputable fact. (See Preliminary Notes Toward a Study of Judicial Notice, E. F. Roberts, Cornell Law Quarterly, Vol. 52, No. 2, Winter I, 1967, pp. 210, 233-237.)

Teenage interest in Girlie magazines is common knowledge, particularly owing to the fact that adults were teenagers once.

In any case, all of the Roth tests, especially the social value test, should be less onerous in their demands upon the prosecution when applied in a *child* obscenity law, since a child under seventeen has not yet attained such aesthetic and intellectual maturity that the material that might have some social worth as to adults has any real social importance for him.

B. The scienter provision of 484-h is not unconstitutional as an undue restraint on the distribution of materials to adults.

Appellant also attacks *the scienter* provision of 484-h as a restriction on freedom of the press. This argument deals with a claimed *indirect* effect of the section (as dis-

tinguished from the *direct* restraining effect on freedom of the press in the distribution to minors envisaged in the first argument). Presumably it is also a challenge to the statute *on its face.* It appears to argue, in effect, that a mere reading of the scienter provision reveals that, *in operation,* it must necessarily cast upon the seller or distributor within the reach of the statute a burden of inspection so difficult to discharge that he will refrain to some extent from circulating materials to adults which lawfully may be sold to adults rather than run the risk of violating the law. This argument is an attempt to restate the rationale of *Smith* v. *California,* 361 U.S. 147, involving a so-called adult obscenity statute, so as to suggest its relevance to the issues in this appeal, an exercise which would seem to run counter to the view of the New York Court of Appeals in *People* v. *Tannenbaum* (18 N.Y. 2d 268, 273).

To give a fuller statement of appellant's argument, he contends that 484-h is unconstitutional because the enforcement of its ban regarding sales to minors, which allegedly requires booksellers to ascertain the factual and legal nature of the article sold and the age of the buyer, would impose a heavy burden of inspection and legal judgment which would intimidate booksellers and induce them to refrain from sales to *adults* of material protected when sold to adults. Thus, according to appellant, the operation of 484-h would have the indirect effect of confining adult reading material to that suitable for adolescents, within the condemnation of the *Butler* v. *Michigan* rule (352 U. S. 380).

This argument is not compelling, since most adults patently are over the age limit set out in 484-h. Thus, dealers will rarely withhold sale to an adult for fear of violating 484-h. Moreover, the statute recognizes the defense of honest mistake as to age. It follows that the dealer who has made inquiry as to age and received reassurance will rely on the honest mistake provision and

will not hesitate to sell to an adult or child, even if he has not examined the work being sold. If he does hesitate, it will not be 484-h which induces his caution.

In the relatively few situations where age is in doubt, the buyer to whom, allegedly, the dealer might be hesitant to sell in the absence of an honest mistake provision as to age, will be a youngster so close to the statutory age limit that he will, at most, enjoy a lower order of First Amendment rights than adults. Restraints on the distribution of literary and pictorial materials to such children is less offensive to free expression guarantees than limitations on sales to adults and more easily justified by the overbalancing weight of the state's interests in child welfare and parental control, as is shown elsewhere in this Brief.

Indeed, most children in this marginal age category will be so young that they could have been included within the prohibition of 484-h without giving constitutional offense.

It is the view of the New York Court of Appeals that a statute can properly place the burden of legal judgment on the bookseller and require him to determine if material sold by him comes within the objectionable category defined by the statute (*People* v. *Finkelstein*, 11 N.Y. 2d 300; in accord: *United States* v. *Oakley*, 290 F. 2d 517, cert. den., 368 U.S. 888).

This Court has taken a similar position in obscenity cases. It has required that scienter be shown only as to contents; it has not imposed upon the prosecution the impossible burden of proving that the defendant knew the book was obscene. (See *Smith* v. *California*, 361 U.S. at 147, 149, 154).

In the *Mishkin* case, it approved a New York statute which it viewed as placing the same burden of judgment on bookdealers as on publishers (383 U.S. at 511, note 10).

There is nothing in the generalized wording of the due process clause that would justify the conclusion that a heavier burden of judgment may be placed on publishers than on bookdealers.

So far as it objects to the burden of judgment placed upon the bookseller, this contention is really a vagueness argument in disguise. In effect, it rests upon the implicit premise that the definition of obscenity propounded in the obscenity jurisprudence of this Court and in the statutory criteria of 484-h is so vague that the bookdealer cannot learn from reading the statute what particular materials are within its prohibition. But this Court rejected this argument in Roth and succeding cases when it held that the definitions in question were sufficiently definite to meet the test of due process. It follows that this Court has, in effect, approved the policy of compelling the book dealer to sustain the burden of judgment. It may be observed that the police officer's authority to make arrests without a warrant in obscenity cases is founded upon the assumption that he is capable of judging the legal quality of the materials which come to his attention.

Although this type of "indirect restraint" scienter argument was not asserted by the appellant in the Broderick case, a similar contention was advanced in *People* v. *Tannenbaum,* 18 NY 2d 268, (decided September 29, 1966) and rejected by the New York Court of Appeals. There the Court had under review Section 484-i of the Penal Law. It is true that 484-i defines "knowingly" as actual knowledge or the *failure to make reasonable* inspection, whereas in 484-h it is defined as "having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry or both".

However, regarding the necessity of proof of scienter as to contents, there is really no significant difference between 484-i and its requirement of "reasonable inspection", which would appear to require inspection when

there is reasonable ground for believing inquiry is warranted, and 484-h with its provision that scienter is proved where it is shown that defendant had "reason to know or a belief or ground for belief which warrants further inspection or inquiry".

Therefore, the Court of Appeals' approval in Tannenbaum of the scienter provision in 484-i suggests the validity of the scienter provision in 484-h. While the appellant in Tannenbaum centered his attack on the absence of a scienter requirement as to age, the Court of Appeals' decision must be viewed as validating the entire scienter provision and Section 484-i in its totality.

Section 484-h may be interpreted as demanding a greater showing of scienter than 484-i, since 484-i requires proof of scienter only as to *content* and not as to *age,* whereas 484-h exacts a demonstration of scienter as to both *contents* and *age* as a condition of liability.

In *Smith* v. *California,* 361 U.S. 147, *this court observed that any criminal obscenity law will cause some self censorship* and expressly left open the question of what minimum showing of scienter must be exacted by a prohibitory statute if it is to survive the ordeal of constitutional review.

The *Smith* court held that the obscenity ordinance in question must be struck down as defective on its face because its enforcement would tend to restrict indirectly, *i.e.* in operation rather than by its express prohibition, the freedoms protected under the First Amendment.

The ordinance in *Smith* did not pass constitutional muster because it dispensed *completely* with the knowledge requirement regarding the nature of the material in question, thus ordaining strict liability. Some observers have speculated that, under the circumstances there present, the burden of strict liability might induce some limitation on free circulation of literature, although this was not proven. This court in *Smith* expressly reserved the ques-

tion of whether some condition of awareness, short of specific apprehension of contents, would suffice to legitimize penal retribution (361 U.S. at pp. 154, 155), and the issue of scienter as to age was not in the case.

Due process does not dictate that Section 484-h require the Prosecution to show that the defendant had actual knowledge of the contents of the particular magazine in question nor does *Smith* v. *California* hold to this effect. (*People* v. *Tannenbaum*, 18 NY 2d 268, 273). In his concurring opinion in *Smith* v. *California*, 361 U.S. 147, 162, Mr. Justice Frankfurter made it clear that a lesser showing was sufficient to satisfy the constitutional requirement of scienter. He stated, in part, at page 161:

> "The court does not hold that a bookseller who insulates himself against knowledge about an offending book is thereby free to maintain an emporium for smut . . ."

and on page 162:

> ". . . If as I assume, the requirements of scienter in an obscenity prosecution like the one before us does not mean that the bookseller must have read the book, or must substantially know its contents on the one hand, nor on the other that he can exculpate himself by studious avoidance of knowledge about its contents . . . It ought at least to be made clear . . . that the Court's decision in its practical effect is not intended to nullify the conceded power of the State to prohibit booksellers from trafficing in obscene literature . . ."

and on page 164:

> "Accordingly, the proof of scienter that is required to make prosecutions for obscenity constitutional cannot be of a nature to nullify for all practical purposes the power of the State to deal with obscenity . . . A bookseller may, of course, be well aware of the nature of a book and its appeal without having opened its cover, or, in any true sense, having

> knowledge of the book. As a practical matter, therefore, the exercise of the constitutional right of a state to regulate obscenity will carry with it some hazard to the dissemination by a bookseller of non-obscene literature. Such difficulties or hazards are inherent in many domains of the law for the simple reason that law cannot avail itself of factors ascertained quantitatively or even wholly impersonally."

Moreover, Mr. Justice Harlan declared that the scienter requirement in obscenity prosecutions may be more relaxed than that required in other types of criminal prosecutions (p. 170).

A reading of *Mishkin* v. *United States*, 383 U.S. 502, 510-511, reveals that this Court has more recently declared its willingness to approve a less rigorous evidentiary burden than proof of acquaintance with specific contents.

In Mishkin, this Court stated on this subject:

> "Scienter.—In *People* v. *Finkelstein*, 9 N.Y. 2d 342, 344-345, . . . the New York Court of Appeals authoritatively interpreted § 1141 to require the 'vital element of scienter', and it defined the required mental element in these terms: 'A reading of the statute . . . indicates that only those who are *in some manner aware of the character of the material* they attempt to distribute should be punished . . .'
>
> Appellant's challenge to the validity of § 1141, founded on *Smith* v. *California* . . . is thus foreclosed . . . The definition of scienter required by § 1141 . . . *fully meets the demands of the Constitution* . . ." (emphasis supplied)

To the same effect are the decisions of the New York Court of Appeals in *People* v. *Tannenbaum*, 18 N.Y. 2d 268, and *People* v. *Finkelstein*, 11 N.Y. 2d 300, 304 (1962), where the proof fell far short of showing that the defendant had actual knowledge of the contents in question. In accord is the case of *People* v. *Schenkman* (20 Misc.

2d 1093, 1098, aff'd *sub nom People* v. *Finkelstein*, 12 A.D. 2d 457, rev. on other gr. in 9 N.Y. 2d 342), the case quoted in the portion of this Court's *Mishkin* opinion just set forth.

Mr. Justice Brennan's declaration in the majority opinion in *Smith* (at p. 154) that eyewitness testimony of a bookseller's acquaintance with specific contents is not necessary and that circumstances may warrant the inference that he was aware of what the book in question contained despite his denial, has been interpreted to mean that the Supreme Court was sanctioning the concept of *constructive scienter*, especially in view of Mr. Justice Brennan's mention of "notice of the character" of the material (at pp. 152, 154). It can be inferred from the total context of Mr. Justice Brennan's discussion that knowledge of contents may be presumed from knowledge of the "type" of material contained therein, and that perhaps even knowledge of the "type" of material can be inferred from still other circumstances. Most state courts are in accord with the view that scienter need not be actually shown but instead may be constructive, that is, inferred from surrounding circumstances suggesting the nature of the material. In the state and lower federal court decisions, the following circumstances have been held sufficient to justify a finding of scienter:

Titles of the books in question (*Cincinnati* v. *Coy*, 115 Ohio App. 478, 182 NE 2d 628, 1962; In accord *State* v. *Onerato*, 199 A 2d 715, Conn., 1963; *U. S.* v. *Hochman*, 277 F. 2d 631, 633-34). The *books themselves* (*People* v. *Harris*, 192 Cal. App. 2d 887. In accord, *Womack* v. *U.S.*, 294 F. 2d 204, cert. den. 365 U.S. 859—1961). *Covers of books* (*Peo.* v. *Shapiro*, 6 AD 2d 271, 177 NYS 2d 670; *Cincinnati* v. *Coy, supra; U. S.* v. *Hochman, supra; People* v. *Tannenbaum*, 18 N.Y. 2d 268, 270; *Peo.* v. *Finkelstein*, 9 NY 2d 342; *Chicago* v. *Doe*, 197 NE 2d 711; *State* v. *Vollmar* (389 SW 2d 20, Mo.), including *photographs on the*

cover (*State* v. *Jungclaus,* 126 NW 2d 858, Neb.; 1964) or *drawings or statements* thereon (*People* v. *Finkelstein,* 11 NY 2d 300). *Advertising material,* even though defendant hadn't seen the books advertised (*People* v. *Harris, supra; People* v. *Sikora,* 204 NE 2d 768, Ill., 1965). The fact that defendant had received complaints or comments (*People* v. *Williamson,* 207 Cal. App. 2d 839). A cursory leafing through magazine without reading it (*State* v. *Chobot,* 106 NW 2d 286, 291, Wisc., 1960, app. dism. 368 US 15).

In the light of the above authorities, it seems clear that the scienter provision of 484-h is not offensive to due process, since it requires proof of acquaintance with circumstances giving notice of the nature of the material in question.

Moreover, the pronouncement of invalidity in *Smith* v. *California* is not applicable here. In that case this Court said that absolute or strict responsibility for knowledge of *contents of all materials sold to all persons* was too heavy a burden on the bookseller. Nowhere in *Smith* was it intimated that absolute responsibility to determine the contents of materials *sold only to children* or to determine the *age* of prospective purchasers was an excessive burden or would unduly restrict by indirection the flow of protected materials. As we have seen, 484-h does not impose absolute responsibility, but there is nothing in *Smith* v. *California* pronouncing the illegitmacy of such a requirement in a statute involving children.

In *People* v. *Tannenbaum,* 18 NY 2d 268, the New York Court of Appeals has sanctioned a provision for strict liability as to the age of the purchaser. The Court, after considering this Court's decision in *Smith* v. *California,* held that there is no constitutional requirement of scienter as to age.

Even if this were not so, appellant's assertion that the scienter provision of 484-h places a "heavy burden" on

"the small store operator" is surely mistaken (*People* v. *Tannenbaum*, 18 NY 2d at page 274). It is clear from defendant's own testimony in the trial record that defendant was fully familiar with the Girlie magazines sold by him as well as the other types of magazines (R 182-189, 196-198, 209-210). In the instant case, appellant did not even bother to ask the purchaser's age although he might easily have done so.

Indeed, all a seller need do when he is selling to a young person is to inquire as to his age and take a look at the magazine or book purchased before taking his money. In this case and in all other cases involving the "Girlie" type magazine, a mere glance at the cover would tell the seller to go no further with the sale (R. 209, 210). Sex-oriented books usually reveal their nature from their covers, titles and prices (see *Mishkin* v. *United States, supra*). Certainly the small effort of inspection required may be justified in terms of the overridingly important objective served by such requirement—the protection of the young (*Bookcase Inc.* v. *Broderick*, 49 Misc. 2d 355, 357, aff'd, 18 NY 2d 71). Far greater efforts have been demanded of business enterprises by regulatory statutes in the service of less urgent social purposes.

One commentator has suggested that the bookseller might deal with materials barred to youth by the establishment of a rack or "shelf for adults only" (39 S. Calif. Law Rev. at 371, 372). Such a system of segregation would quickly apprise the dealer when children were selecting the wrong types of books, where the shelf for adults was separated physically from the shelf for children.

That 484-h has not had a restrictive effect on the distribution of printed matter is proved by the facts of this case. Nowhere in his testimony at the trial did the defendant claim that 484-h impelled him to self-censorship. Indeed, the trial evidence proves the contrary. Despite the warning given defendant by complainant's mother (R 73,

74, 79, 179) he continued to sell magazines freely and with no attempt at supervising or checking the sales to young people.

Appellant's claim in substance that 484-h would have a general restrictive effect in "uncounted and unnamed" future cases does not present a claim ripe for adjudication by this Court (*Communist Party of America* v. *Subversive Activities Control Board*, 367 U.S. 1, Mr. Justice Frankfurter's majority opinion. See also *Mishkin* v. *United States*, 383 US at 511, note 10).

The notion that a small store operator is utterly ignorant of the nature of the magazines he sells and utterly incapable of informing himself on them is naive and unrealistic. Actually most candy stores and luncheonette operators are familiar with the nature of most or all of the magazines they offer for sale. This knowledge is obtained when the magazines are unpacked periodically on arrival from the distributor and arranged for display and sold and handled in the normal course of business (R. 210). Those operators who do not have such knowledge can easily gain it by spending a few hours after closing time for a night or two familiarizing themselves with the printed products they offer. If such effort is demanded of them it is clear that they will undertake it rather than refrain from selling the magazines in question, since the effort involved in familiarization would be relatively small and the alternative policy of withholding sale would result in loss of income and profits.

The fact is, the small store operator would *not* really be burdened unduly even by a strict liability statute (*People* v. *Tannenbaum*, 18 N.Y. 2d 268, 274). The same is true of large book stores, as may be gathered from the encyclopedic and particularized knowledge displayed by clerks and sales personnel in such stores.

The magazines sold by the small store operator almost always reveal their nature from their covers. In the few cases where this is not so, a mere riffling through the pages will reveal nude photos and the like and suggest the inadvisability of sales to children. Indeed, such operators are certainly familiar with the wellknown Girlie magazines and the nature of their contents. Many of them have been on the market for some time.

The attempt to nullify New York's statutory program for the protection of the health and morals of the young by resort to specious arguments and fanciful forecasts of restrictions on freedom of the press which have no basis in fact should not be approved. (See *Bookcase Inc.* v. *Broderick,* 49 Misc. 2d 355, 357, affd. 18 N.Y. 2d 71). It would be equally unfortunate if the rule of *Smith* v. *California* were extended to a legal context where it has no relevance.

The indirect suppression finding of *Smith* v. *California* has no practical force if it is invoked in an attempt to show that the scienter provision of 484-h will in fact significantly restrict access of the *adult* public to protected material. Since most adults are patently over the statutory age limit, the seller will not be inclined to abstain from sales of material to *adults* out of fear that they might be unsuitable for *children.*

In the infrequent cases where there is doubt as to the age of the purchaser, a simple inquiry or quick glance at the publication (see *People* v. *Tannenbaum,* 18 N.Y. 2d 268, 274) will enable a decision as to whether or not to sell. Also, the statute recognizes the defense of honest mistake with respect to the seller's determination of age.

C. There is no merit in the claim that the present method of enforcement of the obscenity laws is overly restrictive and that initiation of a criminal prosecution against a dealer without first obtaining a civil adjudication of obscenity against the publisher is constitutionally objectionable.

The brief of the Author's League of America as *amicus curiae* objects to the enforcement method of criminal prosecution of book dealers despite the fact that criminal prosecution for obscenity has always been sanctioned by this court. The Author's League contends that under the "too drastic means" doctrine of *Shelton* v. *Tucker,* 364 U.S. 479, the public prosecutor should be required to obtain an adjudication of obscenity in a civil proceeding agains the publisher before instituting criminal charges against dealers.

It is argued that the suggested procedure will prevent the burden of litigation from falling on the weakest link in the chain of distribution—the individual dealer—and will place it instead on the strongest link—the publisher. However, it can be argued by civil libertarians that, from the point of view of freedom of expression, this is the least desirable procedure, although an arrangement for civil adjudication could doubtless be contrived which would satisfy the requirements of due process, as may be gathered from this Court's approval of the injunction proceeding set out in Section 22a of the New York Code of Criminal Procedure (*Kingsley Books, Inc.* v. *Brown,* 354 US 436). Such remedies are of doubtful utility in many situations, since they do not provide for voluntary submission of questionable materials prior to distribution to dealers and the public. Compulsory submission would raise grave issues of censorship.

Where the publisher is sued in a civil proceeding by the public prosecutor who seeks a decision that the material to be published is objectionable, the publisher, if the decision

goes against him, probably will notify the dealers not to distribute it and will refrain from making delivery to those who have not received it. Thus, the public will never see it. Indeed, if the method of declaratory relief includes a procedure for enjoining distribution of material found offensive to the relevant statute, then it is certain that it will never see the light of day unless reversal is obtained on appeal.

Contrast this with the practicalities of the existing method of enforcement by criminal prosecution. Such prosecutions do not begin until the published material has been distributed to the dealers (and usually not until considerable quantities have been sold throughout the state and the country). Then, even if a conviction is obtained against a dealer in a particular locality, the dealers in other counties of the state (and probably also those in other localities in the same county), or many of them, will continue to stock the work in issue until they are prosecuted. Even then, they may emerge victorious from legal battle because judges in different parts of a given state—even county—sometimes disagree.

Actually, by the time court proceedings have resulted in a conviction of one dealer, the other dealers will probably have sold out and distributed to the public their copies of the work in question.

But let us assume that the proposed declaratory procedure is not combined with injunctive relief against a work judged and found wanting. In such case, the publisher may refrain from distributing for fear of criminal prosecution against himself or the dealers. If, instead, he publishes and distributes, in states where scienter is not presumed from sale, scienter will then be provable against him and possibly also his dealers (especially if he advises them of the previous Court adjudication, or it is publicized), whereas otherwise, the difficulty of proving scienter might forestall or defeat prosecution.

Moreover, under the civil suit arrangement, police all over the state and probably in adjoining states will now be alerted to the existence of the publication in question, and the result will be far more prosecutions than would have been the case if the material had quietly been distributed to dealers without an attempt to get a prior civil adjudication as to its legal character. If the civil judge was wrong in his ruling, the damage may be done nonetheless.

Also, since scienter will not be in issue in the civil proceeding, it will be easier to obtain an adjudication against the publisher than it would be against a dealer in a criminal action. If the publisher decides to appeal the civil adjudication and delays distribution pending appellate review, his publication, if it is a regular periodical, will probably be out of date by the time he has exhausted all appellate recourse. Thus, even if he ultimately prevails on appeal, he will have won a pyrrhic victory.

Seen in the light of the above factors, the suggested new procedure is not such a vitally effective and practically significant remedy that it can be said to be mandated by the Fourteenth Amendment or that it can justily be claimed that the difference between it and the present procedure is of constitutional proportions. On a careful factual analysis, it is not at all clear that it would increase freedom of expression; indeed, it is at least equally possible that it would have the opposite effect.

In practice, it could have the result of dispelling uncertainty and, to some extent, relieving the distributor of the burden of judgment, but, in so doing, it might well result in restricting the flow of expression. To some people, a fruitful disorder may seem preferable to a restrictive certainty. In any event, it can hardly be argued that the guarantee of liberty in the due process clause requires the latter rather than the former or that 484-h is needlessly restrictive because it fails to provide for such a procedure.

Nor can it truly be said that the type of statute here involved imposes an inevitably heavy burden of judgment on the dealer. If this Court should affirm the conviction in this case, then dealers will be forewarned that sale of such Girlie magazine to minors is barred by statutes like 484-h and their burden will be lightened to that extent.

It may also be noted that this Court has expressed a preference for criminal prosecution over prior restraint as a method of control (*Quantity of Copies of Books* v. *Kansas*, 12 L. Ed. 809, 378 U.S. 205).

Since the present procedure of enforcement is not constitutionally infirm, it follows that the suggested new procedure is not constitutionally mandated. Its acceptance is a matter of legislative policy rather than fundamental law.

It may well be that such new legislation is desirable and that it may assist law enforcement agencies in the performance of their functions. But that does not justify the claim of unconstitutionality put forward by appellant.

D. The appellant's conviction may also be affirmed under the Ginzburg pandering rule.

The magazines involved in this case may be considered obscene for another reason. The total circumstances of their public display (see R. 209-210) and distribution suggest that they come squarely within the Ginzburg rule of commercial exploitation to emphasize prurient appeal.

Thus, in *Ginzburg* (383 U.S. 463), this Court (at p. 465) assumed that although the material in question might not be obscene standing alone, it should be adjudged obscene since its commercial exploitation concentrated on the sexually arousing aspects of the works exploited, and was obviously calculated to win the patronage of those

who would react to such aspects rather than to the artistic values of the works in question.

The suggestive photographic covers of the magazines here in question, featuring provocatively posed, scantily clad females, with the added suggestiveness of come-on titles referring to articles and features within, are obviously designed to emphasize the prurient aspects of the matter which lies between the covers. Even if these covers did not themselves offend against all the statutory criteria set out in 484-h, they would constitute pandering because of what they suggest about inner contents.

If the magazines in question have any non-sexual aspects, children attracted and stimulated by the covers, will hardly be concerned to search for them. One need only watch teenagers leafing through Girlie magazines in cigar stores and luncheonettes and hear their excited comments to be convinced of this.

The Court may judicially notice (see *Mugler* v. *Kansas,* 123 U.S. 623; *West Coast Hotel Corp.* v. *Parrish,* 300 U.S. 379; *Hawkins* v. *United States,* 358 U.S. 74, 81-83; *Brown* v. *Board of Education,* 347 U.S. 483, 494, n. 11; *Escola* v. *Coca Cola Bottling Co.,* 150 Pacific 2d 436, Judge Traynor concurring) that Girlie magazines, such as those here in issue, by their method of presentation to the public, are not designed to engage any type of interest other than the sexual, or, indeed, even to suggest that their mission is other than to stimulate sexual sensations.

It is true that this Court, in the *Redrup-Austin-Gent* case, 386 U. S. 767, has recently found that the Girlie magazines there in question did not come within the *Ginzburg* pandering test. The only publication which that case and this case have in common is "Sir", and apparently the issue of "Sir" there involved was not the same one as that under review in this case. The promotion and sale in those cases involved adults. It is respectfully urged

that the impact of such exploitation on teenagers would activate prurient interest to a greater extent than it would in the case of adults, most of whom are insulated against excitement by long familiarity with sexual matters, and, in most cases, by regular sexual satisfaction. In a teenage context, the promotion in question would more effectively focus the attention of prospective purchasers on the sexual stimulation offered by the works exploited. In addition, the appellant's public display of the covers of Girlie magazines (and the public character of the display can be discovered from the trial record, *e.g.*, R. 209-210, and from the photographs of the Ginsberg Luncheonette in evidence and submitted in this case in the Amicus Curiae Brief of the Citizens for Decent Literature) certainly produced, and was calculated to produce, a sensation impact by forcing these covers on the attention of teenagers, including Richard Corey. (Indeed, it appears from a reading of Ginzburg that it is not necessary to prove that such exploiting *actually did* have an impact or shock effect. This Court seems to have judicially noticed that the material there in question would have the effect which it was held to have in *Ginzburg*.) Therefore, appellant was guilty of "forcing public confrontation" with offensive material within the contemplation of this Court's rationale in the *Ginzburg* case (383 U.S. at 470).

E. The definition of what is harmful to children in terms of the prevailing standards in the adult community is a constitutionally permissible legislative policy.

The Brief Amicus Curiae of the Council for Periodical Distributors also criticizes the provision of the statute (Subdivision 1 (i.i)) which defines the "harmful to minors" standard in terms of that which is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable for minors. This

viewpoint seems to proceed from certain imperfections of analysis. It is submitted that there is nothing constitutionally unacceptable in making an adult view as to what is suitable for children the statutory determinant, and of enacting the statutory criterion in question in such terms that "the minors whose constitutional rights are to be defined have no voice in determining what is 'suitable' ".

The whole purpose and underlying assumption of a special statute for children more restricted than the adult obscenity statute is that children are not intellectually and emotionally mature enough to deal with materials that adults are capable of handling. Thus, the adult viewpoint, being more mature, should have controlling force with respect to what is suitable for minors. If the statute were conditioned on the child's view of suitability, it would exercise no prohibitory effect, because the child's curiosity would make him receptive to virtually any materials, or else, being too young to have thought-out convictions, he would have no articulated standards at all regarding this subject.

The public policy which lies behind the principle of adult judgment in Section 484-h is doctrinally consistent with traditional approaches. The law generally removes the power of decision with respect to important matters from children in virtually every department of our common existence, *e.g.*, infants' contracts are not binding and may be disaffirmed at the termination of the minority period; the behavior, morals and social activities of the child are under the control of his parents and, ultimately, the State as *parens patriae;* decisions as to his intellectual development and education are not within his discretion, but rather reside within the decisional power of parents and school officials.

The law in many states will not even allow a teenage child to decide for himself whether to smoke or drink;

statutes prohibiting sale of tobacco or liquor to children are common the States of this union.

It would be extraordinary if the New York legislature were to jettison this pervasive, long-established public policy when it came to enact a child's obscenity law, especially since the opinions of the average child as to the suitability of literature for children would not be worth any more (indeed, less, owing to the complexity of the subject) than its views on other matters. It seems frivolous to suggest that a matter as momentous in its consequences for a free society as the moral development of the young should be determined by the caprices of child-like judgment.

F. Appellant cannot raise First Amendment objections to the statute's prohibition against distribution to children under seventeen years, since he was convicted under a children's obscenity law and obscene materials are not within the protection of the First and Fourteenth Amendments.

It has been pointed out that *Bookcase Inc.* v. *Broderick,* 18 N.Y. 2d, 71, sustaining the constitutionality of Section 484-h, reflects the view of New York's highest Court that 484-h enjoins the sale of material to children which is *obscene as to them,* although not necessarily obscene as to adults.

Since, under the Broderick rationale, 484-h may be viewed as restricting only the circulation of obscenity, the defendant whose acts come within the regulatory purview of the section cannot interpose objections to his conviction invoking the First and Fourteenth Amendments, or assert, by way of defense, the rule of clear and present danger or other intellectual techniques limiting the regulation of forms of expression protected under these amendments. This conclusion follows from the holding in *Roth* v. *United States,* 354 U.S. 476, at pages 486

487, that obscene material is not within the area of constitutionally safeguarded expression and constitutes a distinct category of verbal acts conceptually marked off from expression which is within the shelter of First Amendment guarantees.

Since the "Girlie" magazines here in issue have been adjudged after trial as violative of 484-h, they have been, in effect, found obscene under the circumstances of this case, *i.e.*, when sold to a child under seventeen years (and properly so in view of their well known tendency to excite the sexual feelings of adolescents and the New York Court of Appeals' approval of the same classification of similar "Girlie" magazines in *People* v. *Tannenbaum*, 18 NY 2d 268. See also the finding of a panel of experts whose examination of "Girlie" magazines is described in "Obscenity: Some Problems of Values and The Use of Experts" by John P. Frank, 41 Washington Law Review, pp. 631, at pp. 647, 656, 657. These experts found such magazines of questionable social value).

It follows that the appellant's First Amendment argument to the effect that 484-h, in enjoining distribution to children, unconstitutionally restricts freedom of the press by direct prohibition is legally forceless.

POINT III

Even if 484-h were not an obscenity statute, it would still be constitutionally acceptable.

A. The statute's approach is a constitutionally permissible way of restraining the distribution to children of sex-oriented publications.

Even if 484-h be viewed not as an obscenity statute, which it is, but rather as enjoining forms of expression falling short of the category of obscenity, appellant's prayer that 484-h be stricken down as an imposition on freedom of the press should still be rejected. This seems

a valid conclusion because, so far as the circulation of publications to *adults* are concerned, the scienter clause of 484-h, as we have seen, is not unduly restrictive of freedom by indirect impact, as appellant claims, and since, so far as the statute's effect on circulation to *children* is concerned, even protected expression may be regulated directly in certain circumstances.

It has frequently been recognized that government may, in the field of sex-oriented publications, enact legislation specially adapted to the young, which bars the dissemination to them of material which is constitutionally protected from suppression when it is sold to adults. (*Peo.* v. *Kahan*, 15 N.Y. 2d 311; In re *Louisiana News Co.*, 187 F. Supp. 241; *State* v. *Settle*, 156 A. 2d 821, R.I.; *Bookcase* v. *Broderick*, 18 N.Y. 2d 71; *People* v. *Tannenbaum*, 18 N.Y. 2d 268; *U. S.* v. *Levine*, 83 F. 2d 156, 2nd Cir.; *Matthews* v. *State*, 99 So. 2d 568, Fla.; 112 Univ. of Pa. Law Rev. 834, 848; T. I. Emerson in Yale Law Journal Vol. 72, No. 5, p. 739; Criminal Law Bulletin, Vol. 1, No. 8, Oct. 1965, pp. 28, *et seq.*; 52 Ky. L.J. 429; 43 N.C.L. Rev. 172, 185; 16 W. Res. L. Rev. 780, 784; 1964 Wash. U.L.Q. 98, 116; Vol. XXXV, No. 4, Notre Dame Lawyer, p. 546, 1960; concerning films, see 69 Yale Law Journal 141, 1959.)

This Court, in *Jacobellis* v. *Ohio*, 378 U.S. 184, 195, quoted at the beginning of this brief, declared the propriety of such legislation, and the same standpoint was implied by the language in *Butler* v. *Michigan* (352 U.S. 380, 383).

This perspective is in accord with this Court's view that the state's power over the young exceeds its regulatory competence with respect to the affairs of adults (*Prince* v. *Mass.*, 321 U.S. 158).

B. The statute's constitutionality and this prosecution are vindicated by the balancing test.

Two basic questions raised by this appeal are:

1. Whether the social value to children of sex-oriented literature and pictures or of material designed primarily to arouse sexual excitement is so great that, in the absence of scientifically certain knowledge of its precise effects on the young, which may never be available, society must be rendered impotent to limit its distribution to children and made to run the risk of the considerable damage which present knowledge indicates may well flow from it?

2. Should this risk be run when it can be avoided simply by banning sale of such material to children until they reach seventeen years of age.

It is submitted that the correct answer to this question has been suggested by the following statement of Judge John F. Scileppi of the New York Court of Appeals:

> "In balance, public decency and morality are more important than the deprivation resulting from the banning of noxious publications which seem to appeal to the small segment of our people whose baser instincts make reading of obscenity and pornography their favorite pastime." (Dissenting in *Larkin* v. *G. P. Putman's Sons*, 14 N.Y. 2d 399, 408.)

It is an oft-affirmed principle of our constitutional jurisprudence that the First Amendment does not ordain absolute principles and that the adjudication of a challenge to a regulatory act on First Amendment grounds requires a judicial balancing of interests (*Breard* v. *Alexandria*, 341 U.S. 622; *Dennis* v. *United States*, 341 U.S. 494, 517, 544, 545; *Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1, 4; *Scales* v. *United States*, 367 U.S. 203; *American Communications Association C.I.O.* v. *Doud*, 339 U.S. 382, 394; *New York Times* v. *Sullivan*, 376 U.S.

254; *Barenblatt* v. *United States*, 360 U.S. 109, 111; *Konigsberg* v. *State Bar*, 366 U.S. 36, 37; *NAACP* v. *Alabama*, 357 U.S. 449, 451, 460; *Roth* v. *United States*, 354 U.S. 476, 483-485).

Even if 484-h had some tendency to reduce adult reading material to a level suitable for adolescents as appellant claims (and it does not), invocation of the balance of interest test approved in the above cited cases would sustain such imposition, since a small restriction on circulation to adults is justified by the values of child welfare.

Also, suppression of commercial distribution to *children* of the type of ideas expressed in Girlie magazines, which do not deal in the expression of political or philosophic ideas or serious commentary on public policy and which do not have any literary value (Vol. 41 Washington Law Review pages 631, 647, 656, 657), is justified by the important interest served thereby: protection of the young. Indeed, the materials banned by 484-h all involve nudity, sexual conduct, sexual excitement and sado masochistic abuse and are of no social importance for children, and it follows that none of these materials would have weight when balanced against society's interest in the well being of its children and in its policy of parental control.

There is a constitutional scale of values relevant to the varying types of expression which must be consulted in the act of balancing and "not every type" of utterance "occupies the same position on the scale of values * * *

Where there is no substantial public interest in permitting certain kinds of utterances, they rank low" on the scale of values (*Dennis* v. *United States*, 341 U.S. 544, 545, Mr. Justice Frankfurter concurring) and exert relatively little weight in the process of balancing the interest in freedom at stake against the public interest sought to be realized in the statutory regulation of that freedom. Political commentary ranks high on the scale of values (*e.g.*,

see "What Does the First Amendment Mean" by Alexander Meikeljohn, Vol. 20, No. 3, University of Chicago Law Review, pp. 461, 471 through 474) and expression for *commercial* purposes either has no rank (*Valentine* v. *Chrestenson*, 316 U.S. 52), or, where protected, ranks lower (*Breard* v. *Alexandria*, 341 U.S. 622, 641, 645; Vol. 20, No. 3, University of Chicago Law Review, p. 461; 78 Harvard Law Review, page 1202, section 7).

This Court said in *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, at pages 571-2: " * * *, the lewd and obscene, the profane, the libelous, * * * the insulting or 'fighting' words * * * such utterances are no essential part of any exposition of ideas, and *are of such slight social value* as a step to truth that *any benefit* that may be derived from them is clearly *outweighed* by the social interest in order and morality." (emphasis supplied). These words would seem equally applicable to Girlie magazines which are distributed to children.

The "Girlie" magazine would seem to reside in the lowest category since it has no literary or expressionary value (see *People* v. *Tannenbaum*, 18 N.Y. 2d 268; 41 Washington Law Review 656, 657), and since, in its objective and character as sexual titillation for profit, it is purely commercial. Moreover, the trial court which adjudged appellant guilty herein decided that the magazines here involved were utterly without redeeming social importance for minors within the criterion of 484-h, a decision supported by the record.

A reading of the First and Fourteenth Amendments which would assign the same constitutional status to the puerile exoticisms of the Girlie magazine, such as those involved in this prosecution, or to the materials depicting or describing nudity or sexual conduct or sado-masochistic abuse which are banned by 484-h, as to literature which is the vehicle of commentary or analysis, would conduct the process of interest balancing in such a way as to obscure

the true dimensions and character of the interests at stake. While the enforcement of the right of free expression cannot be made to rest on a finding of the truth of particular ideas (truth being tentative, expanding and emergent and not subject to final, authoritative determination) there is no obstacle in this insight to an exercise of constitutional judgment which distinguishes the types of ideas expressed. Indeed, the possibility of such discriminative classification lies at the heart of this Court's doctrinal stance in the commercial expression and free speech and obscenity cases and in the *Chaplinsky* case and in *Beauharnais* v. *Illinois* (343 U.S. 250).

The law's power of distinction has been almost infinite in similar legal contexts. Subtlety of analysis is its stock in trade and preeminently in the field of obscenity has its capacity for conceptual manipulation proved a means of discriminating social control.

In the area of expression it has propounded categoreal differentiations based upon such concepts as advocacy of action as distinguished from discussion and from "teaching and advocacy in the realm of ideas", picketing as more than mere speech, obscenity, the two-level theory of expression, expression creating a clear and present danger of proscribable substantive evils, or creating a danger of grave future evils, the constitutional scale of values concerning types of expression, the pandering test, etc.

The distinction here urged is, as has been indicated, legalistically justifiable under some of these tests, as is shown elsewhere in this brief. Its practical justification is just as decisive.

To put the matter in plain common sense terms: what is so important about the distribution to children of the material in these magazines or other material within the purview of 484-h? Is such distribution so vital to public welfare that it takes precedence over the sovereign State

of New York's program for protection of the young or its policy of parental control? A jurisprudence such as that which appellant contends for, i.e. a jurisprudence which cannot distinguish between such low-level contents and important types of expression, which allows the risk of debauchment of our young for profit to continue on the mistaken theory that freedom of ideas and the free society's central process of discussion are really at issue here, is a bankrupt jurisprudence. It will visit upon a hapless community all of the disasters which flow from unrealism, all of the hardships which stem from a strange insensibility to obvious distinctions—distinctions which the man on the street can and does make.

If the statute, in general operation, or in its application in this case, is claimed to be a restriction on the circulation of socially important literature to children (and this is impossible in view of the fact that a conviction can only result under 484-h where the material in question has been found to have no social importance for minors and the trial court rightly so found in this case) then a balancing test can still vindicate the statute, since there is a greater public need to protect children than adults (see 39 S. Calif. Law Review, p. 347, Note 6; T. I. Emerson in Yale Law Journal, Vol. 72, #5, p. 939; *Prince* v. *Mass.*, 321 U.S. 158; *In re Louisiana News Co.*, 187 F. Supp. 241), and a lesser need to maintain the maximum dissemination of ideas to children (see T. I. Emerson, Yale Law Journal Vol. 72, #5, p. 939), who do not have the judgment or responsibility to deal with them, than to adults, who are charged by society with the task of evaluating and applying them in civic, social and political life.

Meyers v. *Nebraska*, 262 U.S. 390, and *Pierce* v. *Society of Sisters*, 268 U.S. 310, are cited by appellants and by amicus curiae for the proposition that children have First Amendment rights. Actually these decisions pronounce the historic principle of parental control over the educa-

tion of his offspring and the right of the teacher to pursue a lawful calling. They do not serve as authority for the claim that children have the same First Amendment rights as adults.

Certainly, it cannot be claimed that the materials banned by the statute or under review in this case are necessary to an adequate education or a proper training of character or intellect. They are hardly to be credited with introducing minors to the world of reality. *Indeed, the essential thing about them is their artificiality.*

The point has been made that children will some day become adults and that they should have the same right to receive an unrestricted flow of expression as adults have so that their intellectual powers and critical faculties may develop. In response to this thesis is may be pointed out that 484-h only enjoins the commercial distribution of material to children under 17 years of age. Moreover, it bans only those publications which are so objectionable that they excite prurient interests, are patently offensive and have no redeeming social value. It does not bar access to other materials concerning sex, nor does it prevent the dissemination of the vast range of literature which is calculated to mature and sharpen the mind (*e.g.*, mathematics, logic, Latin, physics) and to impart knowledge of life and its natural processes (*e.g.*, biology and psychology).

To suggest that Girlie Magazines and other materials proscribed under 484-h have something important to offer that these other sources of knowledge and mental training do not, is to assert a frivolous argument.

So far as the *First Amendment rights of bookdealers* are concerned, 484-h simply restrains their freedom to sell to children, who have a lower order of First Amendment rights than adults, even assuming such rights of children are operative against a statute which assists parental

control. Since the rights of children are less weighty on the constitutional scale, the book dealer's right to distribute to children is of lesser magnitude than his right to circulate expressionary materials to adults. Thus, his freedom to sell to children may be limited in deference to the State's substantial interest in child welfare and parental control and the parent's freedom to supervise his children. This analysis is consistent with the view that the regulatory power may properly limit the liberty of one group—here the book dealers—in order to enhance the freedom of another—the parents. (See Constitution of the United States Annotated, Ed. by Edw. S. Corwin, Lib. of Congress, 1953, p. 980.)

C. The clear and present danger test is not applicable to prosecutions under 484-h.

(i) *The clear and present danger test has lost its vitality.*

Even if the magazines here in issue be viewed as not obscene as to children, which they are, but instead as protected expression, which they are not, it is still not incumbent upon the prosecution to show that the acts complained of or the social conditions the statute was designed to regulate created a clear and present danger of substantive evils which are within the power of the legislature to correct. It is submitted that the clear and present danger test is not applicable in a prosecution based upon a statute regulating the sale of objectionable literature to children, and the New York Court of Appeals in *People* v. *Tannenbaum,* 18 N.Y. 2d 268, would seem to have acted upon the same understanding.

Furthermore, this Court and other federal courts have sanctioned restraints on free expression or prosecutions under statutes in restraint of First Amendment freedoms where the prosecutor has made no showing of clear and

present danger and have refrained from invoking this doctrine in reviewing the convictions in such cases. (*Communist Party* v. *Subversive Activities Control Board,* 367 U.S. 1; *Milk Wagon Drivers Union* v. *Meadowmoor Dairies,* 312 U.S. 287, where the test is mentioned but not applied; *Whitney* v. *California,* 274 U.S. 357; *De Jonge* v. *Oregon,* 299 U.S. 353; *Stromberg* v. *Calif.,* 283 U.S. 359; *Scales* v. *United States,* 367 U.S. 203; *Dennis* v. *United States,* 341 U.S. 494, concurring opinions of Justices Jackson and Frankfurter declaring the test to be inapplicable; *American Communications Ass'n. CIO* v. *Doud,* 339 U.S. 382; United *States* v. *Lightfoot,* 228 F. 2d 861 (7th Cir.); *United States* v. *Schneiderman,* 106 F. Supp. 906, 922, 923). Some of these cases involved direct restraints and others dealt with indirect restrictions on free expression.

So staunch a champion of First Amendment freedoms as Professor Thomas I. Emerson, in Yale Law Journal, Vol. 72, #5, page 911, discussed the clear and present danger test in the following terms:

> "The doctrine grew out of cases where the restriction at issue was a *direct* prohibition of expression by criminal or similar sanctions, and is of doubtful application to other kinds of interference with freedom of expression. * * * In any event, the clear and present danger test has not been applied in such cases. * * * In the course of its development the clear and present danger test was expanded to include other factors than the immediate impact of expression in bringing about action. Thus such elements as the nature and gravity of the evil sought to be prevented, the alternatives open to the government and the value of the expression in relation to the harm feared were taken into account. When this was done, however, *the clear and present danger test became indistinguishable from the ad hoc balancing test.*" (emphasis supplied).

Thus, the claimed *indirect* restraint on distribution to adults alleged by appellant in this appeal, even if it did operate, and it does not, clearly would not be tested by the clear and present danger rule. Nor would the direct restraint on sales to children be so judged under the foregoing cases and for other reasons, as will be seen presently. Moreover, as has been indicated, the rule, even if applicable, would only require a balancing of relevant interests.

The noted constitutional authority Leo Pfeffer has concluded that the clear and present danger test has been discarded in all First Amendment areas save that concerning religious freedom. (Church State and Freedom, p. 502).

(ii) *The facts of this case bring it within the category of the "more than mere speech" exception to the clear and present danger rule.*

The clear and present danger concept received perhaps its most dramatic repudiation in this Court's handling of the peaceful picketing cases.

Although the Court in its opinions had no difficulty in locating peaceful picketing within the pale of protected communication, it nonetheless added the qualifying footnote that picketing, having a coercive element, was more than just communication and consequently was regulable even in the absence of clear and present danger, where the statute regulating it was asserting a legitimate social policy of the state. (See *Int. Brotherhood of Teamsters* v. *Vogt*, 354 U.S. 284, and especially the characterization of the majority's position in the dissent of Mr. Justice Douglas; see also "Justice Frankfurter and Civil Liberties" by Clyde E. Jacobs, University of California Publications In Political Science, Vol. 12, pp. 106, 107).

This qualifying concept is equally pertinent in any other regulatory context involving printed or oral expres-

sion which consists of more than mere informational content, as do the types of materials within the prohibition of Section 484-h. Certainly the Girlie magazines in this case convey more than just information. They have an extra ingredient of incitation or coercive stimulation, a non-rational element which makes its impact at a psychic level below the cognitive. They energize the neural apparatus to a sensual response without the mediation of conscious thought, just as picketing, by its inherent coercive force, compels obedience by reflex rather than reflection. Both forms of expression are more than vehicles for the dissemination of ideas and both may appropriately be curtailed without a showing of clear and present danger in the service of the state's legitimate policy objectives—in this case its objectives of protecting the moral and mental condition of the young and of enforcing parental control.

In view of the uncertain career of the clear and present danger test it should not be invoked as a technique of review on this appeal, even if Sec. 484-h were not an obscenity law.

(iii) *The State's regulatory authority over children exceeds the reach of the police power, owing to the added dimension of competence conferred under the parens patriae doctrine, and it follows that it should not be restricted to the extent of the police power by rules, like clear and present danger, delimiting the outer boundaries of the police power's operation or by presumptions, like the preferred position concept, against the validity of police power enactments regulating expression.*

The limitations relevant to the police power's confrontation with the First Amendment are not of controlling force when the state invokes its wider prerogatives as protector of the young. A noted authority has stated that statutes prohibiting the distribution of sexual materials to

children are subject to less restriction under the First Amendment than similar statutes barring distribution to adults (T.I. Emerson, Yale Law Journal, Vol. 72, #5, p. 739). A persuasive argument against the applicability of the clear and present danger test can be based on the language of Justice Brennan's opinion in *Jacobellis* v. *Ohio*, 378 U.S. 184, 195, quoted at the beginning of this brief, and the Court's opinions in *Prince* v. *Mass.*, 321 U.S. 158.

The state has a plenary power over children as parens patriae. (See *Prince* v. *Massachusetts, supra;* In *re Starr*, 245 A.D. 5, N.Y.; *In re Vasko*, 238 A.D. 128, N.Y.; *In re Rotkowitz*, 175 Misc. 948; N.Y.; *Book Case Inc.* v. *Broderick*, 49 Misc. 2d 355, 357, aff'd 18 N.Y. 2d 71).

It has been held that:

> "Minors constitute a class founded upon a natural and intrinsic distinction from adults and legislation peculiarly applicable to them is necessary for their proper protection." (People v. Walton, 161 P. 2d 498, Calif., where the court approved a local minor's curfew law despite its limitation on the right of free movement).

In *Prince* v. *Massachusetts, supra,* clear and present danger was not shown, and yet this Court affirmed the conviction of a guardian who induced his child ward to distribute religious tracts on a public street in violation of a child labor law, despite defendant's claim that his constitutionally guaranteed religious liberty had been infringed. The child's religious freedom was also involved.

The *Prince* case also established the proposition that the First Amendment and Fourteenth Amendment of the federal constitution permit the state regulatory authority a wider latitude of control over children than over adults.

Since the state's jurisdiction concerning children, owing to the added dimension of competence conferred under the parens patriae doctrine, exceeds the reach

of the police power, it follows *that it should not be restricted to the extent of the police power by rules (like clear and present danger) delimiting the outer boundaries of the police power's operation* or burdened by presumptions like that enforced under the preferred position concept.

Statutes enacted under the state's authority as parens patriae should be accorded at least the traditional presumption of constitutionality and not subject to such disabilities as those imposed by the preferred freedoms rule. It is respectfully submitted that the constitutional adjudication of a conviction based on a regulatory measure enacted by a state as parens patriae and designed for the safeguarding of the young, should be favored by a principle of review which recognizes the wide discretion of local government in such matters and restricts federal judicial intervention to those cases where the challenged enactment cannot be sustained on any rational view, i.e., where its invalidity is clear beyond all doubt.

This Court has approved similar tests in reviewing the constitutionality of state legislation enacted under the police power. (*Trustees of Dartmouth College* v. *Woodward,* 4 Wheaton 518, 625; *Munn* v. *Illinois,* 94 U.S. 113; opinion of Mr. Justice Washington in *Ogden* v. *Saunders,* 12 *Wheaton,* 213, 270; *Nebbia* v. *New York,* 291 U.S. 502; *Chicago, Milwaukee and St. Paul Ry. Co.* v. *Minn.,* 134 U.S. 418; *DayBrite Ltg. Co.* v. *Mo.,* 342 U.S. 421, 423; *Holden* v. *Hardy,* 169 U.S. 366, 398).

This Court may judicially notice that a substantial portion of the citizenry of this country accept the desirability of prohibiting the sale to children of the type of materials within the comprehension of 484-h. In such circumstances, it can hardly be claimed that the legislative means set out in 484-h cannot be sustained on any rational view. Moreover, since these means are reasonably related to ends or objectives within the power of the State as parens patriae, as may be seen from the foregoing discussion and the dis-

cussion concerning moral objectives later in this Brief, it is clear that 484-h is constitutionally acceptable.

Chief Justice Warren and Mr. Justice Harlan have suggested deference to local authority with respect to obscenity in general and such a policy is especially appropriate in cases involving the statutory protection of children.

Such a regime of review seems especially appropriate in the light of the dramatic increase in illegitimate children among teenagers, juvenile delinquency and rape and sex crimes in recent years. (See Justice Samuel H. Hofstadter and Shirley R. Levittan, "No Glory, No Beauty, No Stars—Just Mud", New York State Bar Journal, April 1965, page 118.)

Under the clear and present danger test in its extreme form, the state, as regulator of action, is held to a high standard of justification when it seeks to regulate speech as the anticipatable cause of such action or other proscribable evils; *i.e.* it really must show that speech's causative effect is so clear and its linkage with action so obvious that the state's power to proscribe such action necessarily implies the derivative power to proscribe such speech. The proponents of this test urge that democratic theory demands its acceptance, lest democracy's central process of public discussion suffer a loss of effectiveness.

However, where a state acts as *parens patriae* to protect the young, it should be permitted to err on the side of precautionary over-regulation in view of the important interest involved, the lifelong health and well being of the young, because of the prohibitive cost of erring on the side of under-regulation, and in view of the fact that restraints on the dissemination of expressionary materials to children do not really obstruct public discussion or the intellectual or political life of the community.

(iiii) *The clear and present danger doctrine is, by its very nature, irrelevant in the context of this case, and its application to prosecutions under a statute like 484-h would render such a statute totally ineffectual as a means of protecting the morals of the young.*

The cases in which the clear and present danger test was applied in all its unadulterated rigor were those in which it was necessary to determine when speech created a sufficiently proximate danger of undesirable action to be suppressible. Such a test has no relevance to the determination of when it is sufficiently probable that expression will affect youthful morals to justify its containment. Since it was not claimed in the clear and present danger cases that the expression in question affected youthful *morals*, the only other possible justification for its suppression in those cases was its incitatory linkage with proscribable action. As is shown elsewhere in this Brief, the protection of the morals of the young is as proper an objective of the legislative power of the state as the prevention of identifiable acts of evil. However, by the very nature of the case, moral deterioration does not have the aspect of an obvious and imminent danger that impending action has. The *moral* consequences of expression are nurtured over time; they are not manifested in immediate and dramatic reactions to corrupting or conditioning expression.

Therefore, the clear and present danger test is simply not a serviceable methodology for determining whether certain types of expression are harmful to the moral development of children.

A substantial body of available evidence (discussed in a later portion of this Brief) indicates that materials within the regulatory compass of 484-h stimulate juvenile crime and exert an impress on juvenile moral development. Since the moral effects are delayed, the insistence on the application of the clear and present danger test in its full

conceptual purity to the review of prosecutions under minors statutes such as 484-h is tantamount to decreeing that a state may not effectively regulate expressionary materials which condition the morals of youth, even those materials of the most obviously harmful and influential type, since even these do not often exert their shaping force quickly in identifiable incidents of cause and effect.

One of our most distinguished constitutional scholars, Professor Paul Freund, has observed:

> "No matter how rapidly we utter the phrase 'clear and present danger', or how closely we hyphenate the words, they are not a substitute for the weighing of values. They tend to convey a delusion of certitude when what is most certain is the complexity of the strands in the web of freedoms which the judge must disentangle." (Freund, "On Understanding The Supreme Court", 27-28.)

D. Even if the clear and present danger test were applicable, and it is not, that test is now a delayed reaction test and does not require a showing of imminent or present danger or a demonstration that the evils apprehended by the legislature are certain of occurrence.

As the clear and present danger rule has evolved, it has relaxed its earlier requirement that danger be imminent or immediate (see *Cox* v. *Louisiana,* 379 U.S. 359; *Dennis* v. *U.S.,* 341 U.S. 494; *American Communications Ass'n. CIO* v. *Douds,* 339 U.S. 382, and Mr. Justice Black's characterization of the majority opinion in his dissent; *U.S.* v. *Flynn,* 216 F. 2d 354, 2nd Cir.; *U.S.* v. *Mesarosh,* 203 F. 2d 449, 456-475, 3rd Cir).

Even in *Schenck* v. *U.S.,* 249 U.S. 47, the 1919 case in which the doctrine of clear and present danger was first articulated, there was no judicial finding that there was imminent danger of evil consequences from the distribution of the circulars in question (see discussion of

Schenck in *Dennis* v. *U.S.*, 341 U.S. 503-4). The rationale of the case seems to be that mere contact of the circulars (which might be interpreted as urging obstruction of the draft) with the mind of a reader, was an evil which could be prohibited by state law.

While the circulars in *Schenck* didn't explicitly counsel illegal acts, the court said they would have the effect of suggesting such acts, *i.e.*, of producing an undesirable mental state. Similarly, if that court could judicially notice the effect of the circular in *Schenck*, the court here can judicially notice that the Girlie magazines in question would produce an undesirable mental state, *i.e.*, an attitude towards sex which does not accord with community standards. The Court in this case could just as easily predict that Girlie magazines would stimulate premature youthful sex acts within the power of the state to prevent as the *Schenck* court could predict that the circulars there in question would, in fact, lead to obstruction of the draft.

It is the implicit thesis of these decisions relaxing the clear and present danger rule that the mere opinion of the Court of the possibility of evils is enough to legitimize its approval of legislative initiative. Thus, even if the danger rule was relevant to a constitutional review of 484-h, and, as we have seen, it is not, it is not necessary that the dangers be imminent or present.

That *long-run risk* is sufficient justification for legislative action would seem to have been recognized by this Court in *Dennis* v. *United States* (*supra*). The *delayed reaction* theory of *Dennis* could properly be applied in this case if the clear and present danger test were relevant, which it is not. In *Dennis*, this Court accepted a legislative finding that a Communist conspiracy to advocate the overthrow of the government presented a clear danger of incitation to overt insurrectionary activity, although there was really no proof that this was so (see T.I. Emerson, "Toward

a General Theory of the First Amendment," Yale Law Journal, Vol. 72, No. 5, p. 911) and it was a question whether mere advocacy of the overthrow of the government would be a causative factor in such insurrectionary activity in any meaningful sense—the activity under review not involving a call to immediate action.

In view of the important interest at stake—national security—the danger of evil in the future test was invoked. The *Dennis* court relied upon this approach even though the expression involved political commentary, the type which ranks highest on the constitutional scale of values. That approach seems peculiarly appropriate to the instant case, since the preservation of the morals of our young is also one of the most vital objectives of organized society, as is shown in a later portion of this Brief. Indeed, it is perhaps more urgently needed in this case, because the young do not have the self-discipline, judgment and critical faculties to withstand the appeals and the effects of the material in question, and since the vulgar sexuality and cheap sensationalism of the materials here involved suggest that they should be classified in the lowest part of the constitutional scale.

In *Roth* v. *United States, supra,* the brief for the United States, at pages 9 and 10, posed the danger of future moral atrophy and its tendency to lead to future evils of conduct. The brief said:

> "The cumulative effect of circulating material likely to corrupt morals creates a *long-run-risk* of bad conduct * * *. Moreover, public morals is an indivisible whole. One cannot safely corrupt that part dealing with sexual morality without adversely affecting the moral force which governs society in other ways * * *. The breaking down of the respect for morality weakens the 'morale' and the entire fabric of respect for law." (emphasis supplied)

Under the delayed reaction interpretation of the clear and present danger test in Dennis and under the

Schenck holding, it would seem that a statutory regulation may be justified by the possibility of future evil, whether the evil to be anticipated is overt action or deterioration of morals, since this deterioration of morals in turn leads to undesirable action, criminal or immoral, especially where the moral deterioration is of a type which weakens sexual self-control.

Furthermore, as appears from *Schenck* and *Dennis*, the possibility of such occurrence need not be shown by proof on The People's case, but may be judicially noticed by the appellate court reviewing a conviction under the statute in issue. (See *Mishkin* v. *New York, supra,* where the effect of sado-masochistic materials appears to have been judicially noticed; see opinions of Mr. Justice Frankfurter and Mr. Justice Douglas in *Dennis* v. *United States*, 341 U.S. 494; see also *Brown* v. *Board of Education*, 347 U.S. 438; and *Mugler* v. *Kansas*, 123 U.S. 623, where the adverse moral effects of drinking liquor were judicially noticed).

E. 484-h is not an anti-sin law; it may be justified on secular, utilitarian grounds.

As is indicated by the authorities to be discussed presently, the exposure of children to harmful sexual materials tends, in the long run, to debase their sexual morals and, thus, to lead to undesirable overt acts and omissions, sexual and otherwise. As the child mind becomes increasingly conditioned by such materials, the moral deterrent to objectionable sexual conduct is weakened while the sexual appetite is stimulated. The inevitable result is that in a certain percentage of cases, those subject to such conditioning drift into anti-social habits like fornication, adultery and sodomy.

From the foregoing analysis it may be seen that harmful sexual literature and visual representations ultimately cause crime and injurious acts just as surely as one who

counsels, induces or procures such acts by direct, intentional persuasion. Therefore, laws like 484-h are not merely anti-sin laws. They may be justified on the utilitarian, secular grounds that they prevent disease, illegitimacy, sexual perversion and the breakdown of the family. Indeed, it may be seen from a reading of the legislative findings and purposes set out in Section 484-e that 484-h aims at secular, socially utilitarian objectives.

F. A state may impose limits on the distribution of sex-oriented publications to children to protect the morals of its young and the moral foundations of society.

(i) *Society must be empowered to prevent the moral corruption of the young in order to ensure the conditions of its own viability.*

The State has always exercised the power to regulate the conditions of its citizens' moral development (*Mugler* v. *Kansas,* 123 U.S. 623, 660-663; *Beer Company* v. *Massachusetts,* 97 U.S. 25, 33; *People* v. *Kahan,* 15 N.Y. 2d 311, 312; "No Glory, No Beauty, No Stars, Just Mud", by Justice Samuel H. Hofstadter and Shirley R. Levitan, New York State Bar Journal, April 1965, page 118).

Some have argued that the First Amendment will not permit statutory restraints on freedom of the press where the objective is merely the preservation of morals. Others have invoked the due process clause of the Fourteenth Amendment in support of a similar thesis. However, the due process clause was not designed to constrict the traditional power of the states to provide for the morals of its citizens (*Atlantic Coast Line R. Co.* v. *Goldsboro,* 232 U.S. 548, 558; *Nebbia* v. *N. Y.,* 291 U.S. 502; *Mugler* v. *Kansas,* 123 U.S. 623).

Those championing such standpoints assert that a restraint on the distribution of sexual material to chil-

dren must be based upon a showing that the material restrained creates a danger of some overt action, sexual or otherwise. This view seems mistaken. To hold that moral objectives are not adequate justification for legislation is to argue that the community should have no power to ensure that its young shall ultimately become the sort of people that it requires in order to maintain its social health and preserve itself against gradual disintegration.

Such a narrow view of legislative competence amounts to a contention that a free society, which is based as an effective operating entity upon the practically necessary assumptions of personal responsibility, self-control, individual stability, respect for law and the sanctity of the family institution, can be maintained by those lacking in responsibility, self-control, stability, respect for the family and for law.

No doubt the legislative means employed by the free society to preserve the moral foundations of its existence are subject to the limitations of our constitutional tradition, but these limitations are much less confining where free government is acting in its role as parens patriae, as parent to the young; indeed, this must be so if the role is to be enacted successfully. To limit the exercise of this function in the manner suggested by extreme libertarians would be, in effect, to say that this ancient duty can no longer be performed at all.

Laws requiring the education of children beyond the necessities of vocational competence are also based on moral values and if an educated mind is a permissible public objective why not a mind free of the coarsening debasement of vulgar trivia and cheap sexual sensationalism.

To require that obscenity laws be justified by a showing that obscenity leads by identifiable causal force to overt criminal conduct is to restrict dangerously the power of the state to protect itself against these forms of social

influence which more subtly but far more effectively subvert its foundations.

This observation has special force in these times, when the breakdown of the family and the rising influence of extra-familial agencies of character formation, ranging from the street gang to movies and erotic periodicals, has produced an ever-increasing number of young people who are addicted to self-indulgence and cannot take a constructive part in society.

Perhaps the leading academic libertarian theoretician of the First Amendment now living has declared that legislation prohibiting the distribution of erotic material to children is not subject to the same First Amendment restraints as adult ordinances on the same subject.

Professor Thomas I. Emerson has written that:

> "Different factors come into play, also, where the interest at stake is the effect of erotic expression upon children. The world of children is not strictly part of the adult realm of free expression. The factor of immaturity, and perhaps other considerations, impose different rules. Without attempting here to formulate the principles relevant to freedom of expression for children, it suffices to say that regulations of communications addressed to them need not conform to the requirements of the first amendment in the same way as those applicable to adults."

Thus, even if the First and Fourteenth Amendments barred restraints on expression aimed at protecting the morals of adults, it would not interdict a similar statutory provision safeguarding the morals of children.

To argue that such shaping forces are beyond the ambit of the regulatory power is to trivialize that majestic engine of sovereignty. To immunize from community control those profoundly influential causative factors which shape the character of the young and determine the fundamental com-

plexion of society and the degree in which it is able to create the general conditions conducive to law observance and social responsibility is to withhold from the community the power to secure the basic circumstances of its viability.

Within the limits set by such circumstances, of course, a free artistic and intellectual life may flourish exempt from the direction of any central agency. However, a view of the regulatory function which would affirm its authority to enjoin spitting on the streets and other socially insignificant species of conduct, while removing from the area of its operation, the basic character-forming forces of society would, in effect, deny that society the means of achieving meaningful control over its own destiny.

It is true that a free polity cannot enforce a sectarian ethos through the agency of law or give it the imprimatur of official doctrine. Such matters are left to the free exercise of private choice. But it must be permitted to determine the basic environment of choice. It must be authorized to proscribe those degrading influences which fix moral development at an inferior level and prevent the youthful psyche from advancing to that status of internal discipline and selectivity where it may enter into full possession of the self and unmitigated sovereignty over the unruly play of sexual impulse and appetitive drives.

There is nothing in this view which is inconsistent with *democratic theory.* That theory affirms the value of free traffic in ideas, but it does not require that society stand impotent against those self-aggrandizing forces of sensationalism which would pervert that freedom by arresting the development of the moral actors invoking it, thereby limiting their ability to use it meaningfully.

Perhaps, where adults are concerned, non-obscene expression which advocates immorality by force of argument or as a doctrinal position cannot be dealt with under the

State's power to protect morals. This Court's decision in *Kingsley Pictures Corp.* v. *Regents,* 360 U.S. 684, indicates as much. However, we deal here with a statute confined in its protective effect to children. Furthermore, where sexual immorality may be induced by the arousal of sexual impulses through sensuous stimulation rather than by intellectual persuasion or ideational suggestions of its desirability, where moral character is in danger of being corrupted not by the cognitive response of the moral actor to the demonstrations of rhetoric but rather by the gradual undermining of his self-control and the progressive intensification of his sexual appetities through continuous contact with non-rational agencies of excitement, the regulatory intervention of the State is even less inconsistent with the ideal of free expression in the realm of moral ideas.

Youthful irresponsibility is deeply subversive of a civilization founded on individual responsibility. It is more important for society to suppress material coarsening the moral fiber of the young and weakening their psychological restraints on excitational experiment and heedless self-gratification than it is to restrain the distribution to adults of bizarre material like that in Mishkin. The adult receiver will experience a fleeting titillation and no more, since his character is already formed.

The hedonistic susceptibility to excitement is characteristic of the juvenile delinquent. (See "Alienation, Hedonism and Life Vision of Delinquents", a sociological study in "The Journal of Criminal Law, Criminology and Police Science, Vol. 58, No. 3, Sept. 1967, pp. 325, 326, 327, 328). Many youngsters who grow up in an atmosphere of extreme sexual permissiveness will tend to see life as an exercise in easy self-indulgence rather than as a career in self-discipline and moral responsibility. The proofs of this thesis lie all around us in the mindless and irresponsible hedonism of the hippie. These are the bitter fruits of an over-permissive and over-stimulating culture. Such permissiveness should not be abetted by the sanction of a retrograde constitutionalism, as appellant seems to urge.

(ii) *Barbarization of moral tone is the inevitable prelude to institutional decline and is properly within the ambit of legislative concern.*

In adverting to the deleterious effect of sexual materials on human character, Mr. Justice Harlan, concurring in *Roth* v. *United States*, 354 U.S. 476, 502, note 6, has observed:

> "Furthermore, even assuming that pornography cannot be deemed ever to cause, in an immediate sense, criminal sexual conduct, other interests within the proper cognizance of the States may be protected by the prohibition placed on such materials. The State can reasonably draw the inference that over a long period of time the indiscriminate dissemination of materials, the essential character of which is so to degrade sex, will have an eroding effect on moral standards."

Moreover, it would not seem a necessary condition to the exercise of the legislative power that the erosion of moral character take a dramatic form or result in an obvious, immediate lapse of ethical standards or a manifest weakening of ethical compulsions on overt conduct. The brutalization of spirit and the vulgarizing of youthful emotional sensibilities are enough to call forth the counter action of the community's agencies of adaptation, since, in the long run, pervasive barbarization of moral tone and the arrest of moral development at a pre-adult level is the inevitable prelude to institutional decline and the morbid attenuation of those crucial social relationships (such as the family) which provide the foundation and ultimately determine the health and viability of modern society.

G. Even if the clear and present danger test were applicable, it has been satisfied, since legislative findings and expert opinion attest the harmful effects of sexual materials such as those banned in 484-h on the morals and behavior of the young.

(i) *The legislative finding of danger should be respected.*

Even if the clear and present danger rule were applicable in this case, its requirements have been satisfied. It has been noted that this rule was formerly invoked to test the propriety of particular applications of regulatory statutes in individual cases but is now employed as a device to determine whether statutory restrictions are justified by the social dangers they purport to regulate. (See Essays in Poltical Theory, Presented to George Holland Sabine, Cornell University Press, The Clear and Present Danger Doctrine in Free Speech Cases by Robert E. Cushman; see also the opinion of Mr. Justice Jackson in *Dennis* v. *United States,* 341 US 494.)

Where the enacting Legislature has made a legislative finding of clear and present danger (as the New York Legislature has in Section 484-e of the Penal Law) that finding will suffice to justify a statute regulating the conditions of danger (*Bookcase Inc.* v. *Broderick,* 18 NY 2d 71, 77; *Communist Party* v. *Subversive Activities Control Board,* 367 US 1; *Dennis* v. *United States,* 341 US 494, Mr. Justice Frankfurter's concurring opinion; *American Communications Association CIO* v. *Douds,* 339 US 382; *Gitlow* v. *New York,* 268 US 652; *Roth* v. *US,* 354 US 476, 501-02; *Nebbia* v. *New York,* 291 U.S. 502).

Section 484-e embodies the legislative judgment that the materials within the compass of 484-h create a clear and present danger of substantive evils of conduct in that they promote acts of juvenile crime. The section also finds that such material impairs the moral development of youth.

(For similar legislative findings see N.J. Rev. Stat. Section 2A; 115-331 supp. 1965; *State* v. *Settle,* 156 A. 2d 921, 924, 1939, R.I., which case was cited with approval by Mr. Justice Brennan, in *Jacobellis* v. *Ohio,* 378 US at page 195).

(ii) *There is much expert authority to support the view that materials such as those within the statutory ban do cause juvenile crime and immorality.*

The material proscribed by the statute creates the danger of juvenile crime and immorality. The Legislature's judgment to this effect is sound and commands the assent of a considerable body of expert opinion which has linked sexually suggestive materials with juvenile crime and immorality (See Hoover, "Combatting Juvenile Crime, The Role of the F.B.I.", 25 U. Pitt. L.R. 469, 1964; "Foolish Figleaves? Pornography in-and-out of court" by Richard H. Kuh, Macmillan, 1967, pp. 10-13, 233-248; Arthur Freund in 31 Am. Jud. Section 171; Sorokin, "The American Sex Revolution," 1956; Francis J. Connell, in 154 Colum. L.R. 698, 706-08; Murphy, "Censorship, Government and Obscenity", 1963, Senate Report, #2381, 84th Cong., 2d Sess. pp. 8-12, 62; F. Wertham, "Seduction of the Innocent"; Censorship and Obscenity, 66 Dickinson Law Rev., 421-1962; Discussion of Authorities in Judge Scilleppi's dissent in *People* v. *Bookcase, Inc.,* 14 N.Y. 2d 409; Report of Select Committee on Current Pornographic Materials, H.R. Rep. No. 2510, 82d Cong. 2d Sess. 107-108; Hearings on Juvenile Delinquency (obscene and pornographic materials) before Subcommittee to Investigate Juvenile Delinquency of the Senate Committee on the Judiciary, 84th Congress, 1st Sess. 217-21-1955; 39 Bull. of New York Academy of Medicine, 2d series, 545, 1963).

See also the following sources quoted in "Foolish Figleaves? Pornography in-and-out of Court", by Richard H. Kuh (Macmillan, 1967):

January 1960 Federal Bureau of Investigation Law Enforcement Bulletin; Hall, "Poison in Print—and How to Get Rid of it," May, 1964 Reader's Digest; Testimony at Hearings on Obscene Matter Sent Through the Mails, Subcommittee on Postal Operations of the House of Representatives Committee on Post Office and Civil Service, 86th Cong., 1st Sess. (1959); New York Legislative Document No. 83 (1964), Report of the New York State Joint Legislative Committee to Study the Publication and Dissemination of Offensive and Obscene Material, and earlier reports of same committee; Kilpatrick, "The Smut Peddlers" 7-9 (1960); Hoffman, "A Psychiatric View of Obscene Literature," 10 Bulletin of Guild of Catholic Psychiatrists 223 (1963); Armstrong, "The Damning Case Against Pornography," December 1965 Reader's Digest 131; Mussmanno, Address, October 23, 1965, before the Citizens for Decent Literature Convention, New York City; "Can Reading Affect Delinquency?" 16 Juvenile Court Judges Journal 67, 69-70 (summer, 1965).

In Appendix "B" of the Brief Amicus Curiae of Citizens for Decent Literature, Inc., in support of appellee, there are described cases where sexually exciting materials appear to have influenced the performance of criminal acts.

Pitrim Sorokin, one of the greatest sociological thinkers of the Twentieth Century, has written:

"Some 50 million pieces of obscene advertising annually mailed mainly to our teenagers, and a $500 million a year pornographic business in this country, certainly contribute a tangible share to the growth of juvenile delinquency, to the too early and too erratic sexual life of the wild portion of our youth, and to the cult of cynicism, vandalism, and sterile rebellion of our beatniks" (Pitrim A. Sorokin, "Demoralization of Youth: Open Germs and Hidden Viruses," Christianity Today, p. 3, July 6, 1959, quoted in "Foolish Figleaves? Pornography in-and-out-of-court" by Richard H. Kuh, Macmillan, 1967, p. 232).

The renowned social anthropologist, Margaret Mead, has said: "* * * every society has the task of bringing up children who will focus their capacities for sexual feeling on particular persons, with or without bodily expression, and who will not only refrain from large amounts of undirected, objectless sex behavior, but will be able to produce the proper intensity of feeling expressed or unexpressed, for the proper object." (Quoted in Kuh, op. cit., pp. 240-241.)

But as Richard H. Kuh observes, "Pornography * * * runs in precisely the opposite direction. It tends to depersonalize sex, to exalt it for its own sake. Rather than focusing sexual feeling upon another particular person, it tends to exalt sexual *activity* (separating it from *feelings*), and to direct it among fantasies—whether real or imagined—peopled by fully developed persons. Pornography preaches that sexual experience exists for its own sake * * *." (Kuh, op. cit. p. 241.)

In a statement in 1963, the New York Academy of Medicine declared: "The Academy believes that although some adolescents may not be affected by the reading of salacious literature, others may be vulnerable. Such reading encourages a morbid preoccupation with sex and interferes with the development of a healthy attitude and respect for the opposite sex. It is said to contribute to perversion. In the opinion of some psychiatrist, it may have especially detrimental effect on disturbed children." (On Salacious Literature, A Statement by the New York Academy of Medicine, prepared by the Committee on Public Health," 39 Bulletin of the N.Y. Academy of Medicine, 2d Series 545, 1963.)

In testifying before a subcommittee of the United States Congress, Dr. Nicholas G. Frignito, medical director and chief neuropsychiatrist of the Philadelphia Municipal Court stated that the Philadelphia Municipal Court "has case

histories in which sexual arousal from smutty books led to criminal behavior from vicious assault to homicide. Some of these children did not transgress sexually until they read suggestive stories and viewed lewd pictures in licentious magazines." (Hearings on Obscene Matter Sent Through the Mails Before Subcommittee on Postal Operations of the House of Representatives Committee on Post Office and Civil Service, 86th Congress, 1st Sess., 175, 1959).

Dr. Benjamin Karpman, the Chief Psychotherapist of St. Elizabeth's Hospital in Washington, D.C., testifying before another Congressional Subcommittee, declared that pornography "Unfortunately is often given to people of adolescent ages, which from our point of view is a very unstable period of life. Anything may happen during adolescence. You can take a perfectly healthy boy or girl and by exposing them to abnormalities you can virtually crystallize and settle their lives for the rest of their lives." (Hearings on Juvenile Delinquency—Obscene and Pornographic Materials, Before Subcommittee to Investigate Juvenile Delinquency of the Senate Committee on the Judiciary, 84th Congress, 1st Sess., 81-1955).

J. Edgar Hoover, the director of the Federal Bureau of Investigation, has written that:

"Sex crimes and obscene and vulgar literature often go hand in hand" and that such material "is a seedbed for delinquency among juveniles and depravity among all ages." (F.B.I. Law Enforcement Bulletin, January, 1960.)

Dr. Max Levin, a psychiatrist, stated in the May, 1964, issue of Current Medical Digest:

"Unscrupulous publishers cater to the sex hunger of our people and their lurid books and magazines are hot numbers on newsstands, in candy stores and wherever teenagers gather * * * crippling our youngsters by encouraging the expression of sex impulses in an unhealthy direction * * * to make a fast buck they are willing to corrupt our

youth. Their greed is matched by their hypocrisy." (Quoted in New York State Bar Journal, April 1965, page 117.)

Such authorities may be considered for the first time on appeal since an appellate court adjudicating the constitutionality of a statute is not limited by the trial record. (See concurring opinion of Mr. Justice Frankfurter and dissenting opinion of Mr. Justice Douglas in *Dennis* v. *United States,* 341 U.S. 494, and see *Brown* v. *Board of Education,* 347 U.S. 483.)

H. Legislation for the protection of the young from the corrupting effects of sex-oriented publications is sufficiently supported by existing knowledge and need not wait upon a scientific certainty which may never come.

(i) *Not all legislation is founded upon scientific proof.*

Opponents of legislation like 484-h argue that there is no "proof" that sexually provocative pictures or literature cause juvenile crime or immorality.

It is believed that, on any reasonable conception of proof in the realm of social affairs, this view is mistaken, and that the relevant evidence, some of which has been discussed, suggests strongly the truth of the view that such material, along with other factors, exerts unhealthy causal influence on teenage behavior, especially in the case of the sexually unstable, sexually aggressive teenager, and on the moral development of the young. It is not necessary that it have such an effect on every teenager in order to be within the regulatory power.

However, even if it could truly be said that this proposition has not been proven, that is hardly reason to strike down minor's legislation of the type contained in Section 484-h.

If certain scientific proof is to be an indispensable precondition of legislative activity, then it is clear that much of the legislation heretofore sanctioned by the courts must now be judged as constitutionally deficient (see *Noble State Bank* v. *Haskell*, 219 U.S. 104, where Mr. Justice Holmes declares that "we have few scientifically certain criteria of legislation"). Indeed, even in the realm of First Amendment freedoms, this Court has not demanded that public policy bear such an arduous burden of justification as a condition of constitutional legitimacy.

In the case of *Dennis* v. *United States*, 341 U.S. 494, this Court sustained the statute declaring conspiracies to advocate the overthrow of the government to be criminally punishable. This enactment was based upon legislative findings to that effect that such conspiracies created a danger to national security. However, despite the Supreme Court's approval of trial court findings to the same effect and its own view that clear danger of future insurrection was shown, in any scientific sense or any other sense, these findings were not really proven (see T. I. Emerson, Yale Law Journal, Vol. 72, #5, page 911). It appears far from certain that the particular type of advocative activity judged in *Dennis* to be banned by the statute would cause the results that the legislative findings envisaged or cause them to any socially significant extent.

(ii) *In the realm of social phenomena, it is often difficult to determine "cause" or to measure the extent of its effects with precision.*

The word "cause", so self-sufficient in its lucidity to the superficial view, is seen, from a more sophisticated perspective, to conceal ambiguities of almost metaphysical subtlety.

To those who use the word "cause" with easy confidence in its self-evident clarity, it is fair to request that they render explicit the doctrinal assumptions which are

implicit in their understanding of its meaning and which are masked by its deceptive simplicity. It is not unreasonable to ask that they subject the idea of cause to conceptual analysis to dispel its penumbra of indeterminacy by a theoretical exercise which delimits its boundaries and brings it to a condition of perfect articulation.

Otherwise, it is simply impossible to know what they are really demanding when they ask for proof of causation as a strategy of legislative justification. What must such proof reveal?

For instance, are they operating on the unavowed presupposition that sexual literature or photographs shall not be eligible for characterization as a "cause" of sex crimes or immorality unless it be shown that these materials exert such psychic force as to exclude the intervention of self-directing intelligence and to compel a criminal or immoral act by a mechanical process of stimulus and response (and in what percentages of cases must they achieve such a degree of causative pressure)?

Must the circumstances of stimulus and overt action be so unmistakable in their objective character as virtually to rule out the possibility of an act of choice and to suggest with an undeniable force of revelation that the overt action is the utterly determined effect of an antecedent cause external to the will? But suppose there is an interregnum between the stimulus and the overt action? Where the one does not immediately follow upon the other, what then? Where the wrongful act is perpetrated in a psychologically indeterminate situation, where it does not appear to have been totally impelled by the galvanizing and traumatic force of an identifiable act of incitation which canalized the actor's response, will the circumstances be disqualified from classification as a cause-effect situation?

Again, when does a given factor qualify as a cause? When it is the apparently most active or most dramatic

antecedent factor in a presumed cause-effect context? When it cooperates with other causal factors in a causal complex of such a character that if it were not present the effect would not have occurred? Where it acts within a causal complex in such a way that even in its absence the effect would have occurred anyway, but at a different time? And, how can one ever be certain that a factor comes within any of these categories?

And can we assume that the self-serving explanations of criminals as to the causes of their crimes are completely reliable as evidence, and if so, in what percentage of cases? Indeed, can it safely be assumed that they really know the causes of their own actions? Is such an assumption consistent with what we have learned in depth psychology and in our study of the role of unconscious factors in behavior? Or does such learning suggest the need for extended analysis in depth of criminal motivation in each case to determine, among other things, whether the apparent cause of a criminal act was not just a pretext rationalized after the fact or whether, indeed, unknown to the criminal, a different type of stimulus might have caused the same act if the particular stimulus under study had not occurred? And what degree of certainty may be claimed for conclusions obtained from such a methodology of inquiry? (leaving aside the question of its cost and laboriousness, if done on a large scale).

And where a criminal or immoral act or a general habit of social irresponsibility cannot be connected with an obvious stimulus or inciting factor, how can it be determined whether it was or was not the outgrowth of a gradual process of moral attrition or deterioration, or a gradually increasing tendency to focus attention on the erotic aspect of life and women, traceable to a long standing habit of reading sex publications? Indeed, how could one assign a definite weight to such reading in the total casual complex or the total mix of social influences and

determine that its weight was sufficient to justify and make practically meaningful its description as a "cause"?

And even if a mountain of "scientific" evidence were amassed, would it (or a high percentage of it) be so unambiguous in its significance that the case for or against obscenity legislation could be said to be proved beyond disagreement, or would the contending factions still mount their polemical interchanges with the same unrelenting enthusiasm? And in what percentage of cases must sex materials play a causative role before legislation could be viewed as legitimized by scientific proof?

Appellee does not mean to argue that such an order of demonstration in depth as that just discussed is necessary—quite the contrary. It has only sought to suggest the impracticalities which may lurk behind oft-heard demands for scientific proof of causality.

It is accepted by thinkers with just pretensions to expertise that social science, unlike physical science, is not capable of mathematical exactness or certainty. (Society by MacIver and Page, p. 510; 626-8; Social Causation, by R. MacIver, pp. 93-95; 376, 378, 382-6; 392-3; The State of the Social Sciences, ed. by L. White, pp. 9, 14, 15, 350.)

It seems clear that, human psychology, being essentially ineffable, human motivations can never be measured with precision nor can the relative strengths of the causes of social phenomena be rendered in quantitative terms or assigned exact values. (See, R. MacIver, Social Causation, pp. 93, 95; Ginn and Co., The State of The Social Sciences, p. 350, ed. by L. White.)

Indeed, the anatomy of motivation is essentially so impenetrable that it is questionable whether, many social occurrences in the realm of crime can be "proved" to be the effect of a particular cause, if by proof is meant a demonstration affording the certainty attainable in the physical sciences.

This being so, it is equally questionable whether a general theory of criminal motivation can be proved with the certainty of a law of physics or whether it can be "scientifically" established to what extent juvenile delinquency and immorality are caused by the types of materials reached by Section 484-h.

(iii) *Constitutional adjudication must be content with a lower order of demonstration than scientific certainty.*

Constitutional adjudication must be content with a lower order of demonstration than scientific certainty, lest it bind public policy in servitude to the unrealistic expectancies of a naive epistemology.

It is an unreasonable imposition on the community to hold that it cannot protect itself against that which common sense, general opinion and available evidence strongly suggest to be a social danger. There is nothing in the language of the 14th Amendment's due process clause which requires that public safety be so compromised. Certain it is that the available evidence does not prove that the sexually exciting material in question *is not* a factor in *any* juvenile crime or immorality. If it be argued that this proposition has not been utterly ruled out by present knowledge, it is still true to say that there is no good reason for believing it and compelling reasons for believing the contrary.

Even if it could justly be said that the existing evidence did not point decisively in either direction (and it cannot) the important values of child welfare and public safety would dictate that society err on the side of over-protection, especially in view of the negligible weight of the values on the other side of the scale.

It would be an extraordinary innovation in constitutional theory to insist that the exercise of the regulatory power of the states must wait upon the progress of scien-

tific inquiry. The process of public protection cannot be made to depend on so uncertain an engine.

If such is to be the ruling principle of government, public wellbeing may give way to public disaster before the leisurely development of science attains a degree of certainty satisfactory to the opponents of minor's obscenity legislation (if, indeed, such doctrinarianism will ever yield to the counsels of hypothesis grounded in the textures of brute fact).

The fallacy of such an approach is strongly indicated by the mature reflections of perhaps the greatest thinker of our time in the field of social investigation. Professor Robert M. Mac Iver, in his landmark work "Social Causation", remarks at page 382; "One conclusion that has emerged in the course of our inquiry is that the discovery of the causes of social phenomena is progressive and always approximate, always incomplete . . . our knowledge . . ., however far we probe, remains imperfect."

I. Since the state may prohibit the distribution of sexual literature to children even where it is not obscene as to children, the question of whether the state's proof in this prosecution was adequate to satisfy the obscenity criteria of 484-h is not a federal question.

As we have seen, the State may prohibit dissemination of material to children even where it is not obscene as to them, *i.e.*, 484-h is not required by the Fourteenth Amendment to be an obscenity law. Thus, the Roth criteria need not have been incorporated into 484-h. It could simply have prohibited the sale of nude photos of living models to children and it follows that whether the evidence of the obscenity criteria, *e.g.*, the absence of redeeming social importance, is sufficient to sustain an obscenity prosecution is a question of state law and s not present a federal question for this court's adjudication.

Even if Old Masters and great works of art could not constitutionally be barred from distribution to children, this Court, in saving the constitutionality of the statute, as is its rule, may interpret it as excluding such classics from its prohibition. Indeed, its clear language, making sexual prurience the standard of criminality, accomplishes this. But, beyond demanding this minimum provision (which demand is met by the statutory language) the Court should not enforce the additional dimension of demonstration exacted by the statute (*e.g.*, lack of social importance) since, as has been argued, these criteria are not constitutionally mandated with respect to child "nude picture" ordinances and are thus merely state law requirements.

All The People need prove to satisfy the United States Constitution is that nude pictures of the type contained in the magazines in evidence were distributed with the requisite scienter to a child under seventeen years of age. Since this was proved, the United States Constitution is satisfied and the federal issues are exhausted. For a federal Court to extend its review beyond this point would be to constitute itself a tribunal for deciding state law issues.

J. The extreme libertarian philosophy of the First Amendment is not inconsistent with the doctrinal underpinning of this prosecution.

The exegetic ideology which insists upon the interpretation of the First Amendment of the Constitution in absolute terms, so as to enjoin any limitations whatsoever on the freedoms it ordains, has its parallel in the realm of political philosophy.

The libertarian philosophy of the First Amendment counsels that freedom of speech and press should not be limited at all, since the bad effects of its abuse will be nullified by the counterforce of rational criticism in the marketplace of ideas. Thus, the coercive processes of law

should not intervene until mere expression gives way to illegal overt action.

But the cry of fire in a crowded theatre is so exciting that reason as a counter restraint has no opportunity to operate.

Similarly, the effect of sexually exciting materials on the mind of an unstable or erotic teenager is like the action of flame on wood. In such circumstances, excitement is so captivating and distracting that reason is atomized, submerged or deflected into inactivity, even assuming, contrary to fact, that it would be sufficiently developed in children to act as an effective critical and disciplining counterforce.

The human body is one vast irritability apparatus designed to trigger the operation of powerful instinctual mechanisms. Mind, far from acting as an invariable restraint on such impulses, often imparts to them the extra urgency which stems from an aroused imagination.

Therefore, the teenage mind, particularly the erotic or unstable teenage mind, in the context of sexual excitement, like the mind agitated by the cry of fire in the crowded theatre, is in a state of unreason and disposed to immediate action. Even where action is not imminent, reason does not operate to evaluate the stimuli of sexual materials or to obliterate their effect on morals. It follows that the libertarian philosophy, founded on the contrary assumption of the rational mind, is not inconsistent with the philosophic basis of legislative efforts prohibiting the distribution of sexual material to children.

K. Section 484-h is not a prior restraint on expression, its enforcement is not futile, and it will not bar the distribution of great works of literature.

Section 484-h does not constitute a prior restraint on freedom of the press because it does not provide for the interposition of the power of the state prior to the time of publication. On the contrary, its method of enforce-

ment, criminal prosecution, is expressly conditioned upon prior publication and distribution, and the claim that it is a prior restraint is not valid on either factual or legal grounds.

It is also urged by appellant that the statute's restraint on free expression is not constitutionally tolerable because it is exerted in the service of a futile objective. There is no point in banning the dissemination of materials to children, argues appellant, because a child may persuade an adult to purchase the material for him or obtain it from an adult.

If this argument were to be accepted, it would follow that no obscenity statute concerning children or, indeed, any other type of statute barring sales to children (*e.g.*, laws forbidding the sale of tobacco, alcohol, firearms, etc., to minors) could pass constitutional muster, and on this account alone it should be rejected. Moreover, 484-h is not a futile exercise since it will, if enforced, appreciably decrease the flow of sexual materials to children. Furthermore, it is doubtful whether many children will obtain the help of adults in securing the outlawed material. Those parents who furnish access to such material at home will simply be deciding, in effect, not to avail themselves of the statute's help to them in their parental role. Surely there will not be many such parents. For the overwhelming majority, a children's obscenity law will be welcomed as an additional means for ensuring a healthy upbringing for their children.

Appellant enumerates a long list of famous works of literature in page 13 of his Brief and contends that 484-h would bar their distribution. This contention is incorrect. Great works of literary art would be exempt from the statutory prohibition by virtue of 484-h's provision to the effect that its terms are violated only when the distributed material "is utterly without redeeming social importance for minors" (subd. 1 (f) (iii)).

Moreover, great literature would not be "patently offensive" within the requirement of the statute (subd. 1 (f) (ii)), and would not "*predominantly*" appeal to "prurient" interest, as required under subdivision 1 (f) (i).

In addition, a work would not be within the statute where it did not contain pictures of nudity or pictures or detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sado-masochistic abuse.

In view of the formidable limitations on criminal liability, it is clear that literary classics will not be barred from distribution by Section 484-h, contrary to appellant's view. Certainly no court would interpret that law in such a way as to sanction such a result.

POINT IV

Section 484-h is not void for vagueness.

A. The language of Section 484-h is modelled on the phraseology of the obscenity criteria propounded in the decisions of this Court and is in accord with constitutional mandates.

Appellant's claim of statutory vagueness is curious in view of the fact that the provisions in subdivision 1-(f) and 2-(b) of 484-h enumerating the elements of criminality incorporate the criteria approved by the United States Supreme Court in *Roth* v. *United States*, (345 U.S. 476), *Jacobellis* v. *Ohio*, (378 U.S. 184, 195) and *A Book Named John Cleland's Memoirs etc.* v. *Attorney General* (383 U.S. 413, 418), the *Fanny Hill* case, in virtually the identical language employed by these decisions in defining the concept "obscenity", with the slight but necessary adjustments of phraseology needed to relate these formulations to the subject of minors. The linguistic adequacy of the Roth formulations was reaffirmed in *Mishkin* v. *New York*, 383 U.S. 502.

The *Roth* decision has pronounced the sufficiency of the verbal form in which existing obscenity laws are cast, despite their indefiniteness.

It seems difficult to conceive how statutory wording designed to deal with minors could come any closer to the phraseology of these Supreme Court cases. The tests of predominant appeal, taken as a whole, prurient interest, redeeming social importance, patent offensiveness and community standards are all set forth in Section 484-h.

The present Section 484-h was carefully drafted to meet the objections noted by the New York Court of Appeals in striking down the previous Section 484-h in *People* v. *Kahan,* 15 N.Y. 2d 311 (see concurring opinion of Judge Fuld).

At least one distinguished commentator has found Section 484-h sufficiently definite to satisfy the imperatives of due process (Patrick Wall, Lecturer on Criminal Procedure at New York University School of Law, in Criminal Law Bulletin, Vol. I, No. 8, October 1965, p. 28). To the same effect are respected judicial authorities including the dissenting Judges in *People* v. *Tannenbaum,* Fuld and Bergan, who, while disagreeing with the majority's satisfaction with the literary means of Section 484-i, expressed their admiration for the draftsmanship which produced 484-h (see 18 N.Y. 2d at pages 277, Fuld, and 280, 281, Bergan).

It is submitted that Judges Fuld and Bergan are right. The defining terms in 484-h are patently more detailed, precise and tightly conceived than the Section 484-i approved as against a claim of vagueness in *Tannenbaum* (18 N.Y. 2d at pages 271, 273).

In *Bookcase, Inc.* v. *Broderick,* 18 N.Y. 2d 71, 76, the Court of Appeals said that the United States Supreme Court "has recognized not only that its success in defining 'obscene' is limited but also that, by necessity,

such definition must be somewhat imprecise and elastic. The fact is that the new statutes'' Sections 484-i and 484-h "attempt to state an even more precise definition; . . . For example, 484-h uses a three point definition . . . which is virtually identical to the Supreme Court's most recent statement of the elements of obscenity (*Memoirs* v. *Massachusetts,* 383 U.S. 413, 418)."

If the statutory definitions here in question are violative of due process, it is doubtful that any valid enactment concerning minors can be formulated (See: Gellhorn Individual Freedom and Governmental Restraints, p. 55, note 9; 112 University of Pa. Law Review, p. 856, note 4), since the courts of this country in 100 years of adjudication have failed to devise a more definite formula than those articulated in *Roth* and its successor cases.

This Court has held in *Roth* (354 U.S. at page 491) that:

> "The thrust of the argument is that these words are not sufficiently precise . . . This Court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process . . . 'The Constitution does not require impossible standards' . . . In summary, then, we hold . . . that these statutes . . . do not . . . fail to give men . . . adequate notice of what is prohibited."

In *United States* v. *Petrillo,* 332 U.S. 1, 7-8, this Court declared in its review of a criminal conviction that "the Constitution does not require impossible standards" of precision in criminal statutes. It has often approved statutory formulas where more exact wording would embarrass the practical administration of the law in question, e.g. *United States* v. *Kahriger,* 345 U.S. 22, where the phrase "engaged in the business of" was under attack as vague in an appeal from a conviction under a statute prohibiting the conduct of a gambling operation without a Federal tax stamp. It is clear from the holding in *Kahriger*

and like cases and from the similar sentiments expressed in the opinion of Mr. Justice Frankfurter in *Smith* v. *California,* quoted earlier in this brief, that if courts reviewing obscenity statutes accept a claim of vagueness, such as that interposed in this case, it will be impossible to enforce a public policy against the distribution of indecent literary and photographic materials to children. This Court has, on various occasions, sustained statutory language which was not more precise (e.g. *Waters-Pierce Oil Co.* v. *Texas,* 212 U.S. 86, "reasonably calculated to"; *United States* v. *Ragen,* 314 U.S. 513, "reasonable allowance"; *Levy Leasing Co.* v. *Siegal,* 258 U.S. 242, "unjust and unreasonable" or "oppressive" rent; *Nash* v. *United States,* 229 U.S. 373, Rule of Reason; *Boyce, etc.* v. *United States,* 342 U.S. 337, "so far as practicable"; *United States* v. *Petrillo,* 332 U.S. 1, "in excess of the numbers of employees needed"; *Old Dearborn District Co.* v. *Seagram-Distillers Corp.,* 299 U.S. 183 "fair and open competition"; *Sproles* v. *Binford,* 286 U.S. 374, "shortest practicable route"; *Baltimore & O.R.R.* v. *Groeger,* 266 U.S. 521, "proper condition and safe to operate . . . without unnecessary peril"; *Mahler* v. *Eby,* 264 U.S. 32, "undesirable residents"; *Gorin* v. *United States,* 312 U.S. 19, "connected with the national defense"; *United States* v. *Alford,* 274 U.S. 264, crime to build fire "near" timber.

As Mr. Justice Holmes reflected in *Nash* v. *United States,* 229 U.S. 373, at page 377:

> "the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment . . .; he may incur the penalty of death."

It should also be noted that this Court has shown special indulgence with respect to the language of obscenity laws, recognizing the difficulty of precise definition in this area.

Also, there is no evidence of honest mistake in this case, as appellant's own account of the proof reveals, so the issue he raises as to the meaning of that provision is academic.

B. The statutory phrases "reasonable attempt" and "knowingly" are not intolerably vague.

In objecting to the phrase "reasonable attempt" in 484-h(1)(g)(ii), appellant argues that it affords no clear indication to the bookseller as to what particular effort of inquiry he must make to ascertain the age of the purchaser, in order to obtain exculpation under the "honest mistake" provision for a sale to an under-age purchaser. Appellant also objects to the definition of "knowingly" in subd. 1(g). However, it is submitted that these definitions are clearly adequate.

With respect to appellant's challenge to the semantic adequacy of the various definitions of the word "knowingly", the scienter language of 484-h in subd. 1(g), both "reason to know" and "ground for belief" would appear to be no less definite than the familiar and accepted "reasonable ground to believe". The "reasonable attempt" formula may be viewed as merely a restatement of the immemorial "reasonable man" test in an obscenity context. What the statute seems to require is such efforts to avoid a wrongful act of sale as a reasonable man would make or as would be regarded as sufficient by a reasonable mind. The same standard, when applied in negligence law, would exact such efforts as a reasonable man would make to avoid a harmful act.

This test has been invoked in so many branches of the law, and, indeed, has been one of its most widely approved principles for so long, that it is hardly open to serious challenge in any of its forms. The cases cited earlier in this point attest the phraseological propriety of the definitions of "knowingly" discussed above.

C. The statutory words "shameful" and "morbid" have a recognized meaning and are not overbroad in their reach.

Appellant also objects on grounds of vagueness to the words "shameful" and "morbid" in Section 484-h. However, appellant's argument in this regard, even if it were meritorious, and it is submitted that it is not, seeks an adjudication which is idle and academic since the proof in the record demonstrated, and the Court found, that the magazines in issue appealed to prurient interest (R. 249) as well as to shameful and morbid interest and since this portion of the statute, i.e., subdivision 1(f)(i), setting forth the three criteria in the disjunctive, permits a conviction if the material is objectionable under any one of them. The statutory wording here is "predominantly appeals to the prurient, shameful or morbid interest of minors . . ."

It is well settled that a court may not entertain questions which are academic, moot or abstract (*Eisler* v. *U.S.*, 338 U.S. 189; 338 U.S. 383; *St. Pierre* v. *U.S.*, 319 U.S. 41). Moreover, appellant cannot object to the validity or phraseological sufficiency of a statute where it has been properly applied as to him (*Dennis* v. *U.S.*, 341 U.S. 494, 516; *Mishkin* v. *United States*, 383 U.S. 502, 511, note 10).

The words "prurient", "shameful" and "morbid" are taken from the American Law Institute's Model Penal Code, Section 207.10(2), tentative draft #6, 1957, which provides:

> "A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters . . ."

Obviously the obscenity test of this Court and of Sec. 484-h bear the impress of the A.L.I. draft and that draft

establishes the meaning of these two words by equating them with "prurient". The meaning of "prurient" may be conclusively judged as sufficient in definiteness, since it is a term in the obscenity test propounded by this Court in *Roth* and subsequent cases.

In the light of the foregoing consideration, it is clear that the section is not overreaching as is claimed. Thus, there is no merit in appellant's argument that 484-h permits prosecution where literature appeals to "shameful" and "morbid" interest and that this could include magazines containing pictures of nudes painted by Goya or Rembrandt within the statutory prohibition. What the enactors have forbidden by their draftsmanship is the arousal of prurient morbidity or shamefulness not other kinds of morbid interest, as is evidenced by the Court of Appeals' interpretation of 484-h as an obscenity statute in *Bookcase, Inc.* v. *Broderick*, 18 N.Y. 2d 71.

As we have seen, the state, as parens patriae, may prohibit the sale to children of materials which are not obscene, but, if this were not so, it seems likely that this Court would interpret the words "shameful" and "morbid" as synonymous with "prurient". It may be recalled that it performed a similar exercise in Mishkin in equating the meaning of the word "obscene" with that of the terms "sadistic" and "masochistic", since the New York Court of Appeals had previously done so in the *Broderick* case. The New York high court's decision in *Broderick* has substantially the same effect here since, in that case, the Court of Appeals pronounced 484-h an obscenity statute.

D. The statutory test which makes "prevailing standards in the adult community as a whole with respect to what is suitable material for minors" the determinant of patent offensiveness, does not transgress the constitutional requirement of definiteness.

Appellant objects to the statute's wording with respect to the phrase "prevailing standards in the adult community" which is set forth in subdivision 1(f)(ii). He contends that there is no indication of which community is meant and whether the enactors had in mind a local community, a state community or the national community.

He argues, therefore, that the "standards in the adult community" phraseology in 484-h is permeated with vagueness. The dispositive rejoinder is simply that this test is patterned upon the "contemporary community standards" rule approved by this Court in *Roth* v. *United States*, 354 U.S. 476, and succeeding cases, and is no less definite than the analogous provision in the *Roth* construct. Moreover, there is an absence of general agreement in the Court as to the scope of the community.

It may not be amiss to point out that the law has had long experience with the community standards formula and has used it as an instrument of adjudication for many years in the application of the requirement in the federal Naturalization Act that an alien demonstrate good moral character as a prerequisite for obtaining United States citizenship. Good moral character has also been required under the provisions for discretionary relief from deportation and under other provisions for the continued residence of aliens.

In determining the meaning of the phrase "good moral character", the courts have frequently used the test of community standards or the standards of the average man (e.g. *In re Hopp*, 197 F. 561; *In re Capozzi*, 160 Misc. 200; *Petition of R.*, 56 F. Supp. 969, with an opinion by Judge Wyzanski; *Rapouile* v. *United States*, 165 F. 2d

152 and *United States* v. *Francioso*, 164 F. 2d 163, the latter two cases being opinions of Judge Learned Hand in the 2nd Circuit; *Brukiewicz* v. *Savoretti*, 211 F. 2d 541—5th Cir. 1954; *Petitions of F. G. and E. E. G.*, 137 F. Supp. 782—S.D.N.Y. 1956; *Application of Barug*, 76 F. Supp. 407, 409).

Thus, it may be seen that the adoption of the community standards approach in obscenity cases is hardly an earth-shaking heterodoxy and that state and federal courts, on which have sat some of our most distinguished jurists, have found this approach not unserviceable as a tactic of adjudication.

The "suitable for minors" portion of this standard is not as vague as it may seem. Most adults would probably agree that sexually exciting materials should not be distributed to children *in any age bracket* up to seventeen years, *i.e.*, that the standard of suitability does not vary from age group to age group up to seventeen years.

E. The statutory phrase "prurient interest of minors" is not fatally ambiguous.

The Brief Amicus Curiae of the Council for Periodical Distributors argues that the statute is impermissibly vague because the bookseller attempting to determine whether a work appeals to the prurient interest of minors would not know what age group, within the statutory age limit to consider in making his decision. Amicus applies the same argument to the "redeeming social importance for minors" standard. It is also argued that the bookseller would not know whether to consider the prurient interest of the minor in his town or in the state or national community.

This latter argument is really just a variant of the contention that the statute does not define the community whose standard is to be a determinant of judgment. This question has been dealt with just previously in this brief.

With respect to the first agument, it may be noted that similar criticisms have been leveled against the adult obscenity standard promulgated by this Court. Even assuming that "contemporary community standards" refers to the national community, that community is made up of adults of different social and economic ranks, different business and occupational sectors, different intellectual and educational backgrounds, different ages, different races, different religious beliefs, etc. The same diversity would present itself to one seeking to apply the "patent offensiveness" criterion. Nonetheless, this Court has placed its stamp of approval on the community standards formula. In any event, if the statute were constitutionally inadequate for a failure of specification on this point (and it is not), the statute could be saved by interpreting the standard in terms of the age of the child involved in a particular case.

F. The Brief *Amici Curiae* of the Civil Liberties Unions misinterprets the position of Mr. Richard H. Kuh, as expressed in "Foolish Figleaves?"

The Brief for the Civil Liberties Unions as Amici Curiae, on page 12, says that Richard Kuh, in his new book, "Foolish Figleaves?", has conceded the vagueness of 484-h. But the quotation from the book set forth in that Brief is taken out of context and fails to quote the language three paragraphs further down the page where Mr. Kuh writes; "In legislatively enacting those phrases which have nurtured so much chaos, the lawmakers have assured constitutionality. What can be safer than adulating the highest justices by molding a new statute in the very words hailed from their special Sinai?"

G. Appellant's contention that a depiction of "an ardent kiss or embrace" may be actionable under 484-h is mistaken.

Appellant also objects that "the depiction of an ardent kiss or embrace may result in a conviction under the definition of sexual conduct in subdivision 1 (c) since such an embrace may show contact with clothed genitals, pubic area, buttocks or female breast."

Appellant's interpretation is clearly mistaken.

Obviously the clothed genitals would not be visible unless the genitals were in a state of excitement or the clothing were inordinately tight, and such a tightness would necessarily be contrived.

Moreover, none of such depictions of physical contact would be criminally actionable unless they were harmful to minors within the tripartite standard set out in subdivision 1(f). The contact appellant describes would not be patently offensive or predominantly appealing to prurient, shameful or morbid interest. Certainly a court would interpret 484-h as not comprehending the type of contact described by appellant, especially if that were necessary to save its constitutionality.

Finally, it should be pointed out that appellant was convicted for selling materials depicting nudity, not sexual conduct or the type of physical contact he describes in this argument.

In the light of the above considerations, it is clear that 484-h, far from being void for vagueness, exceeds the minimum requirements of precision and specificity exacted by the due process clause of the Fourteenth Amendment.

POINT V

Even if 484-h were constitutionally deficient, appellant cannot complain of it.

This Court has often held that it will not strike down a statute as invalid on its face where the statute has not been unconstitutionally applied in the case under review.

(*Smiley* v. *Kansas*, 196 U.S. 447; *Fox* v. *Washington*, 236 U.S. 273, 277; *Williams* v. *United States*, 341 U.S. 97, 101; *Dennis* v. *United States*, 341 U.S. 494, 515; *Yazoo* v. *Miss V.R.R.V. Jackson*, 226 U.S. 217; *Jaechne* v. *New York*, 128 U.S. 189; *United States* v. *Raines*, 362 U.S. 17).

The possible illegal applications of the statute will not influence the Court to find it invalid on its face since they are severable (*Hatch* v. *Reardon*, 204 U.S. 152, 160, 161; *Telegraph Company* v. *Texas*, 105 U.S. 460; *Chicago TH and SE Ry.* v. *Anderson*, 242 U.S. 283; *Mo. Rate Cases*, 230 U.S. 474; *Associated Press* v. *NLRB*, 301 U.S. 103, 132; *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30; *Crowell* v. *Benson*, 285 U.S. 22, 62). The New York Court of Appeals has also sanctioned this principle (*People ex rel. Alpha Portland Cement Company* v. *Knapp*, 230 N.Y. 48, 60 and cases there cited; *Dollar Company* v. *Canadian C & F Company*, 220 N.Y. 270, 278).

It is not open to appellant to challenge possible illegal applications of 484-h, since the law's immemorial principle of standing prevents him from invoking the rights of others who may be affected by future applications of the statute (*United States* v. *Raines*, 362 U.S. 17; *Tileston* v. *Ullman*, 318 U.S. 44; *Frothingham* v. *Mellon*, 262 U.S. 447). Appellant is similarly barred by the rule that a court cannot grant relief where the issue presented is moot or academic (*Eisler* v. *United States*, 338 U.S. 189, 338 U.S. 383; *Pierre* v. *United States*, 319 U.S. 41). The issue of a statute's general validity is moot where, as here, it has not been applied illegally as to the litigant raising the issue.

He is also foreclosed by the rule of ripeness. Issues which may arise from future enforcement of 484-h are not ripe for adjudication (see *Poe* v. *Ullman*, 367 U.S. 497; see also *Communist Party of America* v. *Subversive Activities Control Board*, 367 U.S. 1, involving an indirect restraint on First Amendment freedoms, and the opinion of Mr. Justice Frankfurter in *Dennis* v. *U.S.*, 341 U.S. 494, involving a direct restraint on First Amendment freedom).

A different rule has been announced in free speech cases, *e.g.*, *in Thornhill* v. *Alabama*, 310 U.S. 88 and *Winters* v. *New York*, 333 U.S. 507, both involving a claim of statutory vagueness amounting to overbreadth, because of the overriding value placed on protected expression. In these cases, a challenge to the general validity of a statute on its face was sustained.

But when the state is acting in its capacity as parens patriae to protect the mental and moral health of its young, it should not be adjudged subject to the confinement of doctrines meant to favor free expression in its confrontation with the more restricted competence of the police power. This observation applies to claims of indirect restraint as well as those asserting direct restraints and claims of vagueness.

Also, the express terms of 484-h restrict only obscene material, and the Girlie magazines in this case are obscene for children and are not protected by the free press guarantees of the First and Fourteenth Amendments.

Thus, the objection to the statute's direct restriction on distribution to minors cannot be asserted to challenge 484-h as invalid on its face (and the *Mishkin* case would seem to approve such a rule for obscenity cases, although its holding, discussed presently, involved a scienter clause, *i.e.*, a possible indirect restraint).

Section 484-h could only inhibit distribution of protected publications to adults through the *indirect* operation of the

scienter provision, if at all. The doctrine of *Thornhill* v. *Alabama* was enunciated in a direct restraint case and should not be applied to permit the assertion of a claim of indirect restraint. It is true that the *Thornhill* approach was applied by this Court in *Smith* v. *California, supra,* to strike down an adult obscenity ordinance as invalid on its face on the theory that its failure to exact proof of scienter would operate as an indirect restriction. However, this Court seems to have aproved a contrary approach in *Mishkin* v. *United States,* 383 U.S. 502, involving an adult obscenity statute, where it was held at page 511, in Note 10:

> "The scienter requirement set out in the test would seem to be, as a matter of state law, as applicable to publishers as it is to booksellers; both types of activities are encompassed within subdivision 1 of § 1141. Moreover, there is no need for us to speculate as to whether this scienter requirement is also present in subdivision 4 of § 1141 (making it a crime to hire others to prepare obscene books), for appellant's convictions for that offense involved books for the publication of which he was also convicted."

In other words, this Court refrained from reaching the question of the validity of subdivision 4 with respect to the scienter issue, since scienter was proved in the *Mishkin* case. *Mishkin* indicates that the objection on grounds of scienter cannot be employed to invalidate an obscenity law in its application to situations other than that in which the particular claim is raised.

As is shown elsewhere in this Brief, the scienter provision of 484-h is constitutionally unobjectionable, but even if it were otherwise, appellant, as we have seen, is not eligible to raise this issue, because there was ample proof of scienter in the trial record, as the statement of evidence in this Brief and appellant's own account of the evidence show.

Such a rule is reasonable where a minor's law is under review in view of the fact that a children's law such as 484-h is not likely to result in indirect restraints on adult channels of dissemination. This is so because children are easily distinguished from adults. The approach here urged is especially appropriate in contexts where, as here, the statute in question contains an exculpatory provision pertaining to honest mistake as to age (see discussion on this subject in Point II of this Brief).

Similarly, appellant cannot ask a general declaration of invalidity respecting 484-h on its face on the ground that the statute is too vague, *i.e.*, overreaching, as he seeks to do in his brief, because 484-h *is not overbroad as to him* (*Dennis* v. *United States,* 341 U.S. 494, 516). In other words, even if the statute was so broad in its coverage that it included harmless literature within its regulatory ambit and could be applied, *e.g.*, so as to prosecute the sale of Mother Goose stories, that gives appellant no ground for complaint. This is so because, to the extent that 484-h prohibits the sale of "Girlie" magazines to children, it is not reaching too far (see *People* v. *Tannenbaum,* 18 N.Y. 2d 268, holding that 484-i may constitutionally enjoin the sale of "Girlie" magazines to children). It follows that 484-h was not applied improperly here and appellant has no cause for complaint even if 484-h, on its wording, could later be applied overbroadly to reach harmless literature (which, by its careful restriction to prurient sexual and sado-masochistic material, it cannot).

In the majority opinion in *Dennis,* a later case than the *Thornhill* or *Winters* decisions, Mr. Justice Vinson disposed of the claim that the statute was void for vagueness with the observation that it was not vague as to the petitioners and the possibility that it might be considered vague in future cases was no reason to strike it down (341 U.S. at p. 516).

Appellant cites *Dombrowski* v. *Pfister* as authority for the contrary proposition, but it is respectfully submitted that *Dombrowski* should not be applied to a legal situation involving a minor's obscenity law, in view of the supreme importance of the public interests which underlie that law. If an attempt is made to apply 484-h overbroadly so as to reach harmless literature (even assuming the statute is wide enough in scope to permit this, and it is not), the proper challenge to 484-h on the ground of vagueness may be interposed at that time.

In any event, even if the *Thornhill* rule is held controlling with respect to appellant's claim of vagueness, the arguments here presented demonstrate that it should not be enforced with respect to appellant's "direct restraint" claim and his "indirect-restraint" argument based on his objection to the scienter clause of 484-h.

It follows from the foregoing analysis that 484-h has not been applied unconstitutionally in this case and there is no occasion for an adjudication as to its general validity.

POINT VI

The proof of guilt was sufficient.

Appellant does not contest the sufficiency of The People's proof of guilt. His appeal in this Court is based on a claim of statutory invalidity. However, appellant's own account of the evidence on pages 4 and 5 of his Brief reveals that prior to the first sale of prohibited material to the 16 year old Richard Corey, the complainant-mother scolded appellant in his store about the sale of Girlie magazines to her 15 year old son (R. 65, 68, 74); that the minor informed appellant Ginsberg 6 days before the first sale that Ginsberg should put the magazines behind the counter so he wouldn't "get in trouble with the law" and that he, the minor, was 16 years of age (R. 65-66); that the magazines

in question were purchased on October 18th and October 26th, 1965, from Ginsberg at the luncheonette owned and operated by him with the help of his wife.

Thus, appellant concedes that all the material factual elements of the charge, and more, are proved by the evidence, i.e., ownership of the premises and sales by appellant to Richard Corey, knowledge of the nature of the magazines sold to Richard Corey, knowledge of Richard Corey's age and that he was under 17 years old, and notice that the sale of the magazines would be in violation of law.

Indeed, a fuller consideration of the evidence in the trial record (see the statement of evidence in this Brief) reveals that The People's case was proved with an overwhelming force of demonstration and that additional proof was supplied by defendant's own testimony.

It is respectfully submitted that this Court's legal judgment as to the character of the material in question will confirm the judgment of the trial court.

It is further submitted that the State of New York, as parens patriae, could have banned the sale of the magazines here in question to minors even if they were not obscene as to children and without requiring that they be objectionable under the obscenity criteria of 484-h. Therefore, the question of whether they are offensive to these criteria is not a federal question (as is contended elsewhere in this Brief). This Court, for the purposes of its review, should require no more than proof that the defendant, with the constitutionally requisite scienter, sold materials depicting nudity to a person under 17 years old. As we have seen, appellant's own account of the evidence, in effect, concedes that these facts were proved.

Since the trial court expressly found that the nude pictures in question appealed to prurient as well as to morbid and shameful interest (R. 249), appellant's invocation of

the doctrine of *Stromberg* v. *California* (283 U.S. 359, 368) is inappropriate. Stromberg merely decreed reversal where it was not determinable from the trial court's findings whether it had rested its judgment of guilt solely on an unconstitutional provision of the statute in question. The trial court in the instant case did not found his decision solely on unconstitutional provisions of 484-h, even if the words "shameful" and "morbid" were fatally vague or constitutionally objectionable, and, as has been shown elsewhere in this brief, they are not. The judgments were also based on findings that the magazines appealed to prurient interest and this standard, as we have seen, is not void for vagueness.

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

WILLIAM CAHN
District Attorney
County of Nassau, State of New York
Attorney for Appellee
County Court House
Old Country Road
Mineola, New York

GEORGE DANZIG LEVINE
Assistant District Attorney
of Counsel

APPENDIX

The Statute Under Review on this Appeal.

Section 484-h. Exposing minors to harmful materials.

1. Definitions. As used in this section:

(a) "Minor" means any person under the age of seventeen years.

(b) "Nudity" means the showing of the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state.

(c) "Sexual conduct" means acts of masturbation, homosexuality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or, if such person be a female, breast.

(d) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(e) "Sado-masochistic abuse" means flagellation or torture by or upon a person clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

(f) "Harmful to minors" means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, when it:

(i) predominantly appeals to the prurient, shameful or morbid interest of minors, and

(ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and

(iii) is utterly without redeeming social importance for minors.

(g) "Knowingly" means having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of both:

(i) the character and content of any material described herein which is reasonably susceptible of examination by the defendant, and

(ii) the age of the minor, provided, however, that an honest mistake shall constitute an excuse from liability hereunder if the defendant made a reasonable bona fide attempt to ascertain the true age of such minor.

2. It shall be unlawful for any person knowingly to sell or loan for monetary consideration to a minor:

(a) any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts nudity, sexual conduct or sado-masochistic abuse and which is harmful to minors, or

(b) any book, phamphlet, magazine, printed matter however reproduced, or sound recording which contains any matter enumerated in paragraph (a) of subdivision two hereof, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sado-masochistic abuse and which, taken as a whole, is harmful to minors.

3. It shall be unlawful for any person knowingly to exhibit for a monetary consideration to a minor or knowingly to sell to a minor an admission ticket or pass or knowingly to admit a minor for a monetary consideration to premises whereon there is exhibited, a motion picture show or other presentation which, in whole or in part, depicts nudity, sexual conduct or sado-masochistic abuse and which is harmful to minors.

4. A violation of any provision hereof shall constitute a misdemeanor. Added L. 1965, c. 327, eff. September 1, 1965.

SUPREME COURT, U. S.

No. 47

JAN 22 1968

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

SAM GINSBERG,

Appellant,

against

THE STATE OF NEW YORK,

Appellee.

APPELLANT'S SUPPLEMENTAL BRIEF

EMANUEL REDFIELD,
Counsel for Appellant,
Office & P. O. Address,
37 Wall Street,
New York, New York 10005.
212 HAnover 2-1023

TABLE OF CONTENTS

	PAGE
Jurisdiction Attached to This Viable Case and Controversy	2
Disabilities and Collateral Disadvantages Flow From the Existence of the Judgment of Conviction	6
The Problem of Mootness Resulting From a Suspended Sentence in a Judgment of Conviction Should Be Reconsidered	8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 47

SAM GINSBERG,

Appellant,

against

THE STATE OF NEW YORK,

Appellee.

APPELLANT'S SUPPLEMENTAL BRIEF

At the request of the court, the appellant submits this brief on the subject of mootness.

As a preliminary observation: this appeal was docketed in this court on February 1, 1967 (notice of appeal having been filed on January 24, 1967, R. 262). This court noted probable jurisdiction on June 12, 1967, with its then docket number 1022. On that very day this court disposed of *Jacobs* v. *New York*, No. 660 and *Tanenbaum* v. *New York*, No. 993, on the ground of mootness. The considerable time that elapsed from the docketing of this case and the noting of probable jurisdiction on the same day those other cases were dismissed, suggests the strong inference that the question of mootness was passed upon by the court in this case when it passed upon the same question in the other cases. The record shows that in the other cases the important one-year rule, hereafter discussed, affected those

cases at the time they were docketed; whereas in this case the one year had not expired: the judgment of conviction was made on May 17, 1966 and the date the case was docketed in this court is February 1, 1967. And it should be stressed, jurisdiction was noted in this case over the motion made by the appellee to affirm.

Whether the appellant's inference is right or wrong, the noting of probable jurisdiction has led to the incurrence of expenses on appellant's side of $7,427, of which $1,700 was for the printing of the record and $402 for appellant's brief.

Jurisdiction Attached to This Viable Case and Controversy

What led to the discussion of mootness in the closing minutes of the oral argument was a query whether the judgment of conviction with a suspended sentence, was but an admonition to the appellant. A study of New York law readily leads to the conclusion that it is nothing of the sort.

The judgment of conviction is an adjudication of defendant's guilt of a misdemeanor, subject to punishment. Section 484-h, Subd. 4 states: "A violation of any provision hereof shall constitute a misdemeanor."

The punishment for a misdemeanor, when none is fixed by the court is found in Section 1937, Penal Law of New York, which reads as follows:

> "A person convicted of a crime declared to be a misdemeanor, for which no other punishment is specially prescribed by this chapter, or by any other statutory provision in force at the time of the conviction and sentence, is punishable by imprisonment in a penitentiary, or county jail, for not more than one year,

or by a fine of not more than five hundred dollars, or both."

Hence, the appellant could have been sentenced to a term of up to one year in prison.

But the trial judge did not fix the term; he suspended sentence on the defendant (R. 253-254, 256). This he could do under the authority of Section 2188 of the Penal Law of New York which reads as follows:

> "The . . . judge . . . may . . . (1) suspend sentence, or (2) may impose sentence and suspend the execution of the judgment."

This meant that the court could delay the imposition of a punishment. But, it should be noticed, the delay was only in the imposition of punishment. It did not minimize the force and effect of a judgment of conviction, with its disabilities and collateral disadvantages.

The postponement of punishment could nevertheless lead to subsequent punishment, for Section 470-a of the New York Code of Criminal Procedure implemented Section 2188 of the Penal Law by enabling a court to impose the punishment at any time within the longest period for which the defendant could have been sentenced at the time of his conviction. In this case, it would have been one year. Section 470-a reads as follows:

> "If, after . . . a verdict of guilty . . . sentence shall have been suspended, the court may impose any sentence or make any commitment which might have been imposed or made at the time of conviction . . . The court may impose sentence or order judgment executed with or without modification . . . at any time after such suspension of sentence . . . within the longest period for which the defendant might have been sentenced for . . ." See, *People, ex rel. Bloom* v. *Collins*, 277 A. D. 21, affd. 302 N. Y. 603; *People* v. *Kastel*, 172 Misc. 784.

The time therefore in which the punishment could have been meted out expired on May 18, 1967. By that time the notice of appeal to this court had been filed, and the case had been timely docketed in this court. Under the statute, 28 U.S.C. 1257(2), the right of the appellant to appeal to this court was conferred by Congress. And since there is a substantial controversy in this case between appellant and the State of New York as to the validity of the exercise of power by the State under the Constitution *to render the judgment,* this court has jurisdiction over such case and controversy (Article III, Section 2).

The conclusion is that this viable case and controversy is rightfully here for decision because the jurisdiction of this court attached to such a controversy when the notice of appeal was filed and the case was timely docketed on February 1, 1967.

In *St. Pierre* v. *United States,* 319 U. S. 41, 42, the court made particular note that the mootness had occurred *before* certiorari was filed.

It cannot be cogently argued (it has not been so argued, but is appellant's exploration of the problem), that the court is now without jurisdiction because more than a year since the date of the judgment of conviction had elapsed at the date of oral argument on January 16, 1968. The controversy between the appellant and the State whether the appellant was validly adjudged a convict, still remains for disposition.

Moreover, if mootness were to result because the sentencing time has [redacted] expired after jurisdiction has attached, results too hideous to associate with the operation and functioning of this court would follow. It would mean that a litigant, through no fault of his own, would be denied an adjudication of his constitutional rights because of the functioning of the judicial process. No matter how expeditious an appellant might be, as here, he would be denied

relief by lapse of time while waiting for decision. For example, in this case, the defendant expeditiously exhausted his remedies in the appellate courts of New York from May 17, 1966 to February 1, 1967, when he docketed his appeal. He should not be penalized because jurisdiction was not noted until June 12, 1967. Nor should he suffer because the printed record was not furnished him until September 22, 1967, he having paid for same on July 13, 1967 upon a June 23, 1967 request. The appellant is not complaining about any delays. He recognizes that time is a factor in all adjudicatory processes, and therefore gives this data only to illustrate the time factors involved. He urges that he should not suffer because of them. And he also points up the complexities that would attend any holding that the expiry of sentencing period while a case, duly docketed under the jurisdiction of this court, is awaiting adjudication, renders such case moot. Such a rule could lead to a case becoming moot even after oral argument and while decision is awaited.

Of course, there are cases, such as a habeas corpus proceeding, where the appeal becomes moot upon release of the prisoner (i.e., *Parker* v. *Ellis*, 362 U. S. 574, which was decided over the dissents of the Chief Justice and Justices Black, Douglas and Brennan). But in such a case, the controversy as to release had come to an end. In such a proceeding, the relief sought against a sheriff was freedom from incarceration. The release of the prisoner attained the end sought by the proceeding. In seeking a review of the judgment of conviction, the appellant is not necessarily contesting the possible fine or possible imprisonment. What he is seeking princpally is to obliterate *his status as a convict.* See Chief Justice Warren dissent in *Parker,* page 593. To many persons, certainly to this humble appellant, the record of conviction not only stigmatizes him as a convict and invites unforeseen consequenees. An example of the significance of a judgment of conviction: to a lawyer convicted of a felony,

with a suspended sentence that could be executed within a year, the reversal of the judgment is more important than a possible fine or imprisonment. The judgment of conviction in such a case not only stigmatizes him professionally, but also leads to automatic disbarment. See also, *Barsky* v. *Board of Education*, 347 U. S. 442, where a physician was disciplined because of a misdemeanor conviction for an offense wholly unrelated to his occupation

Disabilities and Collateral Disadvantages Flow From the Existence of the Judgment of Conviction

We believe we have already demonstrated that no mootness has resulted in this case. But if more is needed, we also show that the judgment of conviction works to the defendant's disability and disadvantage. Section 484-h of the Penal Law does not have the progressively increased punishments for repeated offenses as Section 1141 of the Penal Law. That Section (involved in *Mishkin* v. *New York*) provided, Subd. 2:

> "Upon conviction, *shall* be sentenced to not less than one hundred fifty dollars, not more than two thousand dollars or both fine and imprisonment for the first offense; for the second offense, *shall* be sentenced to not less than thirty days nor more than one year or be fined not less than two hundred fifty dollars nor more than three thousand dollars or be both fined and imprisoned; for a third offense, *shall* be sentenced, to an indeterminate term of not less than six months nor more than three years and in addition thereto may be fined not more than five thousand dollars." (Emphasis supplied)

Nevertheless, there are other disabilities (*Fiswick* v. *United States*, 329 U. S. 211; *United States* v. *Morgan*, 346 U. S. 502):

1. By Section 470-b, Subd. 1, Code of Criminal Procedure, it is specifically provided that the fact that a sentence has been suspended does not militate its force upon a judgment of conviction for a second offense.

2. The weight of a person's credibility is affected by a judgment of conviction, although a sentence is suspended, is specifically provided by Section [redacted], Subd. 2, Code of Criminal Procedure. 470-b

3. A judgment of conviction under the common law of New York renders a person's credibility subject to impeachment. *Real* v. *People,* 42 N. Y. 270, 280; *People* v. *Cascone,* 185 N. Y. 317; see also, Section 2444, Penal Law.

4. Upon a subsequent criminal charge, the defendant may not have bail fixed before a magistrate or a police official. Under the latter rule, Section 554, Subd. 4, Code of Criminal Procedure, a defendant may be admitted to bail at a police station and be spared the delays and involvements in awaiting transportation to a court (sometimes a detention overnight and delay of many hours of imprisonment) to have bail fixed. Under Section 550 he may have bail fixed by a magistrate. But by Section 552 it is specifically provided, Subd. 4(a), that a prior conviction under Section 484-h of the Penal Law (the law involved in this appeal) is one of those "selected offenses" prescribed in Subd. 3 of Section 552 which disables a defendant upon a subsequent charge from being admitted to bail except through the intervention of a Supreme Court judge, with its attendant procedures and delays in fixing such bail.

5. The defendant sells cigarettes and operates a "luncheonette." In various communities such activities are licensed. Should he move to such a community he would be met with the requirement to list any conviction he has against him.

6. The same is true even in an application for a license to operate an automobile. *Matter of Davis* v. *Hults*, 24 Misc. 2d 954.

The requirement to list prior convictions is not an idle ceremony. It is done for a purpose that can be of detriment to the applicant.

7. Aside from statute, upon a second offense a prior judgment of conviction for a misdemeanor is usually taken into consideration upon fixing the new sentence. This is such common judicial procedure, that judicial notice may be taken of such practice.

This is not a complete catalog of the disabilities to the defendant. They are illustrations, chosen within the limited time for the filing of this brief.

The Problem of Mootness Resulting From a Suspended Sentence in a Judgment of Conviction Should Be Reconsidered

If the court must reach this point, it is urged that the problem of mootness, generated by suspended sentences should be reconsidered. It would be adequate in First Amendment cases, into which category the instant case falls, to rely upon the compelling words of the Chief Justice and of Justice Douglas in their dissents in *Jacobs*.

Moreover, we urge that the problem is rooted in a mistaken premise (*St. Pierre* v. *United States*, 319 U. S. 41, 42) that a judgment of conviction is concerned solely with punishment, and hence, if no punishment is to follow from the judgment, no controversy exists. The premise is wrong in assuming what the function of the judgment is. We submit, that the function of the judgment is to adjudicate the issue raised by the complaint. In this case, for example, the State commenced an action against the defendant for the purpose of having the defendant ad-

judged guilty of having violated a penal law. The defendant countered by attacking the statute as invalid, as beyond the powers of the state; in effect, that no judgment could be validly rendered against the defendant adjudging him a wrongdoer. See, dissents in the 5-4 case of *Parker* v. *Ellis, supra.* The judgment of the court would not be advisory. It would affect appellant's judgment as a convicted wrongdoer.

Such a judgment, without more, has consequences not only of the disabilities illustrated above, but as we know, has consequences of unpredictable range. It gives a person a "record". That is what Mr. Cahn, the District Attorney of Nassau County, counsel for the appellee meant when he stated upon the oral argument that he would not want to have a record of conviction himself. He was merely stating the universal abhorrence of individuals to have a "record". The abhorrence undoubtedly is a reaction both to the stigma that may attach as well as to the disadvantages that may follow. Some of the disadvantages we have already enumerated. Others are the disability to vote, Election Law, Section 152, Subd. 4, the incapacity to receive letters testamentary, Surrogate's Court Act, Section 94, Subd. 4.

This court is familiar with the numerous cases that have come to it in which a claim is made that a right or privilege has been denied, based on a prior judgment of conviction. It would be supererogation on our part to elaborate. We cite the *Barsky* case and *DeVeau* v. *Braisted,* 363 U. S. 144, as handy examples.

The unpredictability of what consequences may follow from the very existence of such a judgment is enough to stir one to take every measure to avoid or to invalidate such judgment.

It is the validity of the existing judgment attacked and not possible punishment that is the subject of the con-

troversy. The judgment is the "subject matter on which the judgment of the court can operate", *Ex parte Baez*, 177 U. S. 378, 390. Since such issue is still alive, a controversy exists for determination.

Dated: January 18, 1968.

Respectfully submitted,

EMANUEL REDFIELD,
Counsel for Appellant,
Office & P. O. Address,
37 Wall Street,
New York, New York 10005.

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No. 47

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

SAM GINSBERG,

Appellant,

against

THE STATE OF NEW YORK,

Appellee.

PETITION FOR REHEARING AND FOR CLARIFICATION OF THE OPINION OF THE COURT

EMANUEL REDFIELD,
Counsel for Appellant,
Office & P. O. Address,
37 Wall Street,
New York, New York 10005.
212 HAnover 2-1023

No. 47

IN THE

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OCTOBER TERM, 1967

SAM GINSBERG,

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PETITION FOR REHEARING AND FOR CLARIFICATION OF THE OPINION OF THE COURT

Appellant, Sam Ginsberg, prays that this court grant a rehearing of its judgment dated April 22, 1968, which affirmed the judgment of conviction of the appellant.

(1)

The opinion, first page, states that no attack was made by the appellant upon the statute as applied. Evidently, because the appellant's emphasis upon the need of a ruling on the statute upon its face (Brief for the Appellant, pages 6-7, under Summary of Argument, item "1"), and on the oral argument, the opinion overlooks the fact that the appellant challenged the finding that the books are harmful as to minors.

On page 8 of Brief for the Appellant the question was urged as follows:

> "3. The magazines in question are not obscene by this court's own decisions. The only *charge* against

> Ginsberg is that they contain nudes, in that the female breast is fully exposed. The trial court held that this alone fulfilled all the elements of the crime. We urge that the magazines are not harmful to minors within the tests set forth in the statute."

Again, at page 20 of the Brief:

> "Nor is the literature in this case of that kind: 'Sir' was upheld by this court in *Gent* v. *Arkansas, supra,* and the other three publications are of the same character. They clearly are not of the kind 'directed' to the age class of the statute."

At the oral argument some of the justices participated in discussion with counsel as to how it can be demonstrated that the magazines in question can be the basis for a prosecution, since they were not condemnable under *Gent* v. *Arkansas;* where "Sir" was specifically passed upon (see also, Brief for the Appellant, page 11, second paragraph).

The questions presented included every question fairly comprised therein, Rule 15(c); Rule 40(d)(1)(2); also the opinion of Justice Fortas in this case.

A rehearing and resolution of the question would save future efforts on that issue, it would provide guidance now and reduce the jeopardy that postponement of decision would produce.

(2)

The court failed to pass upon a serious point raised by appellant with respect to the validity of the statute on its face. It was urged, Brief for the Appellant, page 20, that the statute failed to limit itself to material that was

designed or directed at persons under the age fixed by the statute.

We contended that this was a most important point, for otherwise, the effect of the statute would operate to restore the *Hicklin* rule. This court in the *Mishkin* case, recognized the distinction. This point was also made by Lockhart and McClure, the authors of the "variable" doctrine, 45 Minn. Law Review, 5, 84.

Even the State of New York has recognized the importance of the distinction for it amended the statute, in effect September 1, 1967 (see text in footnote on page 20 of Brief for the Appellant) that the predominant appeal shall be judged by its effect upon adults unless it appears the character of the material or the circumstances of its dissemination *was designed* for children.

Although the statute attacked in this case omitted this important factor, despite the appellant's emphasis of it, the court evidently did not pass upon it. This omission warrants a rehearing and amendment of the opinion.

(3)

Although the appellant conceded in his brief and oral argument that the welfare of children (as well as the welfare of adults) is a subject of a state's constitutional power, he urged that in the case of the First Amendment, the state has no power to prescribe literature based on age. The court has repeatedly made the distinction (for one example, in *Smith* v. *California*) that there is a distinction between matters of the mind, literature, and other matters. That distinction supported appellant's appeal. Otherwise, he might just as well not have presented the argument, for he too recognized that *Prince* v. *Massachusetts* and even the common law, have long recognized that children fall into a special class. But *Prince* was not a First Amendment case.

The opinion does not answer this question. What it states is that if a state believés certain material to be harmful to children, it may legislate. We submit, that the constitutional problem posed, has not been answered.

Once it is admitted as a principle, without qualification, as does the court, that legislation may issue against literature because a legislature deems the literature harmful, the logical sequence is that laws may also be enacted against *any* literature the legislature deems harmful. The principle would not be confined to sex-oriented material, but would apply to any claimed harm, such as literature containing violence, crime, brutality or even fantasy.

We respectfully submit that at least in this respect, if rehearing is not granted, the opinion should be clarified. The unqualified language of the opinion is *in terrorem,* if not suggestive for subsequent legislation.

Moreover, the philosophical ground given to support the constitutionality of the law, to wit, that it aids parents in rearing their children, cannot be squared with First Amendment protections to expression, nor does it comport with realities. First, as to constitutional concepts: The same doctrine could apply to any literature; therefore, the argument could logically run that because it is an aid to parents, any literature could be the subject to control by legislation. This is clearly obnoxious to the First Amendment. Secondly, the doctrine that the statute assists parents is a fiction. The statute does not provide for parent enforcement. Indeed, the genesis of such statutes is not parent-inspired, but rather minority group-pressured. In operation, such a statute is enforced by the constable. The constable does not await a request from parents to prosecute. His duty is to enforce the law; and attempts by parents to withhold prosecution could be met with a charge that such parents are compounding a crime. This points up the error in the suggestion that the law is an aid to parents. In stating this, we are of course assum-

ing that "the aid to parent" is a valid ground to support a restraint upon distribution of literature. We have pointed out, however, that the assumption itself is repugnant to the Constitution because it gives rise to alien doctrine,—that parents by legislative fiat containing punishment to a dealer of one-year imprisonment, may control the distribution of literature of any type, including the type in this case.

(4)

A crucial argument of the appellant was the pragmatic one, akin to *Smith* v. *California,* that the tremendous risk placed on a retailer of ascertaining at his peril, whether the material is permissible for adults only would result in a retailer refusing to handle even those passable for adults; it would thus be intimidating and result in censorship. The practical effect of such censorship would return publishers and distributors back to the days before *Roth*—back to the days of *Hicklin.* Because the inevitable operation of the statute would create a standard that would be measured by the effect of the reading matter on children, *Butler* v. *Michigan,* for practical purposes, would thus be overruled.

Lockhart and McClure, *op. cit.* page 86, recognized this, and believed that because of the practical effect of the "variable" doctrine on book distribution, this court would hold a statute, of the type here involved, unconstitutional. Although appellant urged this in his Brief, pages 18-20, the court ignored the contention. And although Lockhart and McClure are cited in the opinion of the court for other propositions, they have been ignored in connection with this argument of appellant, although they are specifically cited.

We submit that this omission warrants a rehearing.

We respectfully submit that the opinion does not answer the contentions as to vagueness which the appellant made in his brief, pages 24-27. The opinion does not come to grips with the serious problem presented by the appellant and the *amici*. The statute does not provide a distributor with a method to discern what material, permissible for adults, is nevertheless harmful for minors. Undoubtedly, it is this lack of clarity which prompted questions from the court at the oral argument, as to how it can be determined (in the light of the statute), that the magazines in this case are not entitled to the benefit of *Redrup*.

The disposition of the vagueness contention on the ground that the scienter requirements have been fulfilled, still deprives a vendor of a need for clarity as to what he may not sell. He is still left with the hazard of selling a classic containing pictures of nudes or of selling the material in *Redrup*.

Without clarification of this important phase, it can be predicted that the courts will be flooded with appeals. If there has been chaos in the cases of adult reading (see opinion of Justice Harlan, concurring) one need not be a prophet to foresee the multiplied difficulties created by a vague statute such as the present one, which gives no clear standard method or criteria for one to be able to make a distinction between literature that is passable for adults, but harmful to children. It is guess-work at best for counsel, the courts and the publishing world. One cannot lightly dismiss the difficulties involved to the publishers and distributors. They live in a world where decisions have to be made. This perilous statute furnishes no guidance to them, other than to intimidate them.

EMANUEL REDFIELD, counsel for the appellant, hereby certifies that the foregoing petition is presented in good faith and not for delay.

Dated: May 14, 1968.

Respectfully submitted,

EMANUEL REDFIELD,
Counsel for Appellant,
37 Wall Street,
New York, New York 10005.

On the Petition:
EMANUEL REDFIELD,
WILLIAM K. FRIEDMAN,
BENJAMIN E. WINSTON.

SUPREME COURT OF THE UNITED STATES

No. 47.—October Term, 1967.

Sam Ginsberg, Appellant, v. State of New York. | On Appeal From the Appellate Term of the Supreme Court of New York, Second Judicial Department.

[April 22, 1968.]

Mr. Justice Brennan delivered the opinion of the Court.

This case presents the question of the constitutionality on its face of a New York criminal obscenity statute which prohibits the sale to minors under 17 years of age of material defined to be obscene on the basis of its appeal to them whether or not it would be obscene to adults.

Appellant and his wife operate "Sam's Stationery and Luncheonette" in Bellmore, Long Island. They have a lunch counter, and, among other things, also sell magazines including some so-called "girlie" magazines. Appellant was prosecuted under two informations, each in two counts, which charged that he personally sold a 16-year-old boy two "girlie" magazines on each of two dates in October 1965, in violation of § 484–h of the New York Penal Law. He was tried before a judge without a jury in Nassau County District Court and was found guilty on both counts.[1] The judge found (1) that the

[1] Appellant makes no attack upon § 484–h as applied. We therefore have no occasion to consider the sufficiency of the evidence, or such issues as burden of proof, whether expert evidence is either required or permissible, or any other questions which might be pertinent to the application of the statute. Appellant does argue that because the trial judge included a finding that two of the magazines "contained verbal descriptions and narrative accounts of sexual excitement and sexual conduct," an offense not charged in

magazines contained pictures which depicted female "nudity" in a manner defined in subsection 1 (b), that is "the showing of . . . female . . . buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple . . ." and (2) that the pictures were "harmful to minors" in that they had, within the meaning of subsection 1 (f)

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the informations, the conviction must be set aside under *Cole* v. *Arkansas*, 333 U. S. 196. But this case was tried and the appellant was found guilty only on the charges of selling magazines containing pictures depicting female nudity. It is therefore not a case where defendant was tried and convicted of a violation of one offense when he was charged with a distinctly and substantially different offense.

The full text of § 484–h is attached as Appendix A. It was enacted in L. 1965, c. 327 to replace an earlier version held invalid by the New York Court of Appeals in *People* v. *Kahan*, 15 N. Y. 2d 311, and *People* v. *Bookcase, Inc.*, 14 N. Y. 2d 409. Section 484–h in turn was replaced by L. 1967 c. 791, now §§ 235.20–235.22 of the Penal Law. The major changes under the 1967 law added a provision that the one charged with a violation "is presumed to [sell] with knowledge of the character and content of the material sold . . . ," and the provision that "it is an affirmative defense that: (a) The defendant had reasonable cause to believe that the minor involved was seventeen years old or more; and (b) Such minor exhibited to the defendant a draft card, driver's license, birth certificate or other official or apparently official document purporting to establish that such minor was seventeen years old or more." Neither addition is involved in this case. We intimate no view whatever upon the constitutional validity of the presumption. See in general *Smith* v. *California*, 361 U. S. 147; *Speiser* v. *Randall*, 357 U. S. 513; 41 N. Y. U. L. Rev. 791 (1966); 30 Alb. L. Rev. 133 (1966).

The 1967 law also repealed outright § 484–i which had been enacted one week after § 484–h. L. 1965, c. 327. It forbade sales to minors under the age of 18. The New York Court of Appeals sustained its validity against a challenge that it was void for vagueness. *People* v. *Tannenbaum*, 18 N. Y. 2d 268. For an analysis of § 484–i and a comparison with § 484–h see 33 Brooklyn L. J. 329 (1967).

". . . that quality of . . . representation . . . of nudity . . . [which] . . . (i) predominantly appeals to the prurient, shameful or morbid interest of minors, and (ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and (iii) is utterly without redeeming social importance for minors." He held that both sales to the 16-year-old boy therefore constituted the violation under § 484–h of "knowingly to sell . . . to a minor" under 17 of "(a) any picture . . . which depicts nudity . . . and which is harmful to minors," and "(b) any . . . magazine . . . which contains . . . [such pictures] . . . and which, taken as a whole, is harmful to minors." The conviction was affirmed without opinion by the Appellate Term, Second Department, of the Supreme Court. Appellant was denied leave to appeal to the New York Court of Appeals and then appealed to this Court. We noted probable jurisdiction. 388 U. S. 904. We affirm.[2]

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[2] The case is not moot. The appellant might have been sentenced to one year's imprisonment, or a $500 fine or both. N. Y. Penal Law § 1937. The trial judge however exercised authority under N. Y. Penal Law § 2188 and on May 17, 1966, suspended sentence on all counts. Under § 470–a of the New York Code of Criminal Procedure, the judge could thereafter recall appellant and impose sentence only within one year, or before May 17, 1967. The judge did not do so. Although *St. Pierre* v. *United States*, 319 U. S. 41, held that a criminal case had become moot when the petitioner finished serving his sentence before direct review in this Court, *St. Pierre* also recognized that the case would not have been moot had "petitioner shown that under either state or federal law further penalties or disabilities can be imposed on him as result of the judgment which has now been satisfied." *Id.*, at 43. The State of New York concedes in its brief in this Court addressed to mootness "that certain disabilities do flow from the conviction." The brief states that among these is "the possibility of ineligibility for licensing under state and municipal laws regulating various lawful occupations . . . ." Since the argument, the parties advised the Court that, although this is the first time appellant has been convicted of any

I.

The "girlie" picture magazines involved in the sales here are not obscene for adults, *Redrup* v. *New York*, 386 U. S. 767.[3] But § 484–h does not bar the appellant

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crime, this conviction might result in the revocation of the license required by municipal law as a prerequisite to engaging in the luncheonette business he carries on in Bellmore, New York. Bellmore is an "unincorporated village" within the Town of Hempstead, Long Island, 1967 N. Y. S. Leg. Man. 1154. The town has a licensing ordinance which provides that the "Commissioner of Buildings . . . may suspend or revoke any license issued, in his discretion, for . . . (e) conviction of any crime." LL 21, Town of Hempstead, eff. December 1, 1966, § 8 (e). In these circumstances the case is not moot since the conviction may entail collateral consequences sufficient to bring the case within the *St. Pierre* exception. See *Fiswick* v. *United States*, 329 U. S. 211, 220–222. We were not able to reach that conclusion in *Tannenbaum* v. *New York*, 388 U. S. 439, or *Jacobs* v. *New York*, 388 U. S. 431, in which the appeals were dismissed as moot. In *Tannenbaum* there was no contention that the convictions under the now repealed § 484–i entailed any collateral consequences. In *Jacobs* the appeal was dismissed on motion of the State which alleged, *inter alia*, that New York law did not impose "any further penalty upon conviction of the misdemeanor here in issue." Appellant did not there show, or contend, that his license might be revoked for "conviction of any crime"; he asserted only that the conviction might be the basis of a suspension under a provision of the Administrative Code of the City of New York requiring the Department of Licenses to assure that motion picture theatres are not conducted in a manner offensive to "public morals."

[3] One of the magazines was an issue of the magazine "Sir." We held in *Gent* v. *Arkansas*, decided with *Redrup* v. *New York*, 386 U. S. 767, 769, that an Arkansas statute which did not reflect a specific and limited state concern for juveniles was unconstitutional insofar as it was applied to suppress distribution of another issue of that magazine. Other cases which turned on findings of nonobscenity of this type of magazines include: *Central Magazine Sales, Ltd.* v. *United States*, 389 U. S. 50; *Conner* v. *City of Hammond*, 389 U. S. 48; *Potomac News Co.* v. *United States*, 389 U. S. 47; *Mazes* v. *Ohio*, 388 U. S. 453; *A Quantity of Books* v. *Kansas*, 388 U. S. 452; *Books, Inc.* v. *United States*, 388 U. S. 449; *Aday* v. *United States*,

from stocking the magazines and selling them to persons 17 years of age or older, and therefore the conviction is not invalid under our decision in *Butler* v. *Michigan*, 352 U. S. 380.

Obscenity is not within the area of protected speech or press. *Roth* v. *United States*, 354 U. S. 476, 485. The three-pronged test of subsection 1 (f) for judging the obscenity of material sold to minors under 17 is a variable from the formulation for determining obscenity under *Roth* stated in the plurality opinion in *Memoirs* v. *Massachusetts*, 383 U. S. 413, 418. Appellant's primary attack upon § 484–h is leveled at the power of the State to adapt this *Memoirs* formulation to define the material's obscenity on the basis of its appeal to minors, and thus exclude material so defined from the area of protected expression. He makes no argument that the magazines are not "harmful to minors" within the definition in subsection 1 (f). Thus "[n]o issue is presented . . . concerning the obscenity of the material involved." *Roth*, 354 U. S., at 481, n. 8.

The New York Court of Appeals "upheld the Legislature's power to employ variable concepts of obscenity" [4]

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388 U. S. 447; *Avansio* v. *New York*, 388 U. S. 446; *Sheperd* v. *New York*, 388 U. S. 444; *Friedman* v. *New York*, 388 U. S. 441; *Keney* v. *New York*, 388 U. S. 440; see also *Rosenbloom* v. *Virginia*, 388 U. S. 450; *Sunshine Book Co.* v. *Summerfield*, 355 U. S. 372.

[4] *People* v. *Tannenbaum*, 18 N. Y. 2d 268, 270, dismissed as moot, 388 U. S. 439. The concept of variable obscenity is developed in Lockhart & McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 Minn. L. Rev. 5 (1960). At p. 85 the authors state:

"Variable obscenity . . . furnishes a useful analytical tool for dealing with the problem of denying adolescents access to material aimed at a primary audience of sexually mature adults. For variable obscenity focuses attention upon the make-up of primary and peripheral audiences in varying circumstances, and provides a reasonably satisfactory means for delineating the obscene in each circumstance."

in a case in which the same challenge to state power to enact such a law was also addressed to § 484–h. *The Bookcase, Inc.* v. *Broderick*, 18 N. Y. 2d 71, appeal dismissed for want of a properly presented federal question, *sub nom. Bookcase, Inc.* v. *Leary*, 385 U. S. 12. In sustaining state power to enact the law, the Court of Appeals said, *Bookcase, Inc.*, p. 75:

> ". . . material which is protected for distribution to adults is not necessarily constitutionally protected from restriction upon its dissemination to children. In other words, the concept of obscenity or of unprotected matter may vary according to the group to whom the questionable material is directed or from whom it is quarantined. Because of the State's exigent interest in preventing distribution to children of objectionable material, it can exercise its power to protect the health, safety, welfare and morals of its community by barring the distribution to children of books recognized to be suitable for adults."

Appellant's attack is not that New York was without power to draw the line at age 17. Rather, his contention is the broad proposition that the scope of the constitutional freedom of expression secured to a citizen to read or see material concerned with sex cannot be made to depend upon whether the citizen is an adult or a minor. He accordingly insists that the denial to minors under 17 of access to material condemned by § 484–h, insofar as that material is not obscene for persons 17 years of age or older, constitutes an unconstitutional deprivation of protected liberty.

We have no occasion in this case to consider the impact of the guarantees of freedom of expression upon the totality of the relationship of the minor and the State, cf. *In re Gault*, 387 U. S. 1, 13. It is enough for the purposes of this case that we inquire whether it was constitutionally impermissible for New York, insofar as

§ 484–h does so, to accord minors under 17 a more restricted right than that assured to adults to judge and determine for themselves what sex material they may read or see. We conclude that we canot say that the statute invades the area of freedom of expression constitutionally secured to minors.[5]

Appellant argues that there is an invasion of protected rights under § 484–h constitutionally indistinguishable from the invasions under the Nebraska statute forbidding children to study German, which was struck down in *Meyer* v. *Nebraska,* 262 U. S. 390, the Oregon statute interfering with children's attendance at private and parochial schools, which was struck down in *Pierce* v. *Society of Sisters,* 268 U. S. 510, and the statute compelling children against their religious scruples to give the flag salute, which was struck down in *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624. We reject that argument. We do not regard New York's

[5] Suggestions that legislatures might give attention to laws dealing specifically with safeguarding children against pornographic material have been made by many judges and commentators. See, *e. g., Jacobellis* v. *Ohio,* 378 U. S. 184, 195 (opinion of JUSTICES BRENNAN and Goldberg); *id.,* at 201 (dissenting opinion of THE CHIEF JUSTICE); *Ginsburg* v. *United States,* 383 U. S. 463, 498, n. 1 (dissenting opinion of MR. JUSTICE STEWART); *Interstate Circuit, Inc.* v. *City of Dallas,* 366 F. 2d 590, 593; *In re Louisiana News Co.,* 187 F. Supp. 241, 247; *United States* v. *Levine,* 83 F. 2d 156; *United States* v. *Dennett,* 39 F. 2d 564; Kuh, Foolish Figleaves 258–260 (1960); Emerson, Toward a General Theory of the First Amendment, 72 Yale L. J. 877, 939 (1963); Gerber, A Suggested Solution to the Riddle of Obscenity, 112 U. Pa. L. Rev. 834, 848; Henkin, Morals and the Constitution: The Sin of Obscenity, 63 Col. L. Rev. 391, 413, n. 68 (1963); Kalven, The Metaphysics of the Law of Obscenity, 1960 Sup. Ct. Rev. 1, 7; Magrath, The Obscenity Cases: Grapes of Roth, 1966 Sup. Ct. Rev. 7, 75.

The obscenity laws of 35 other States include provisions referring to minors. The laws are listed in Appendix B to this opinion. None is a precise counterpart of New York's § 484–h and we imply no view whatever on questions of their constitutionality.

regulation in defining obscenity on the basis of its appeal to minors under 17 as involving an invasion of such minors' constitutionally protected freedoms. Rather § 484–h simply adjusts the definition of obscenity "... to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interest ..." of such minors. *Mishkin* v. *New York*, 383 U. S. 502, 509; *Bookcase, Inc.* v. *Broderick, supra*, p. 75. That the State has power to make that adjustment seems clear, for we have recognized that even where there is an invasion of protected freedoms "... the power of the state to control the conduct of children reaches beyond the scope of its authority over adults ...." *Prince* v. *Massachusetts*, 321 U. S. 158, 170.[6] In *Prince* we sus-

[6] Many commentators, including many committed to the proposition that "[n]o general restriction on expression in terms of 'obscenity' can ... be reconciled with the first amendment," recognize that "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults," and accordingly acknowledge a supervening state interest in the regulation of literature sold to children, Emerson, Toward a General Theory of the First Amendment, 72 Yale L. J. 877, 938, 939 (1963):

"Different factors come into play, also, where the interest at stake is the effect of erotic expression upon children. The world of children is not strictly part of the adult realm of free expression. The factor of immaturity, and perhaps other considerations, impose different rules. Without attempting here to formulate the principles relevant to freedom of expression for children, it suffices to say that regulations of communication addressed to them need not conform to the requirements of the first amendment in the same way as those applicable to adults."

See also Gerber, *supra*, at 848; Kalven, *supra*, at 7; Magrath, *supra*, at 75. *Prince* v. *Massachusetts* is urged to be constitutional authority for such regulation. See, *e. g.*, Kuh, *supra*, at 258–260; Comment, Exclusion of Children from Violent Movies, 67 Col. L. Rev. 1149, 1159–1160 (1967); Note, Constitutional Problems in Obscenity Legislation Protecting Children, 54 Geo. L. J. 1379 (1966).

tained the conviction of the guardian of a nine-year-old girl, both members of the sect of Jehovah's Witnesses, for violating the Massachusetts Child Labor Law by permitting the girl to sell the sect's religious tracts on the streets of Boston.

The well-being of its children is of course a subject within the State's constitutional power to regulate, and, in our view, two interests justify the limitations in § 484–h upon the availability of sex material to minors under 17, at least if it was rational for the legislature to find that the minors' exposure to such material might be harmful. First of all, constitutional interpretation has consistently recognized that parents' claims to authority in their own households to direct the rearing of their children is basic in the structure of our society. "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince* v. *Massachusetts, supra,* at 166. The legislature could properly conclude that parents and others, teachers for example, who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility. Indeed, subsection 1 (f)(ii) of § 484–h expressly recognizes the parental role in assessing sex related material harmful to minors according "to prevailing standards in the adult community as a whole with respect to what is suitable material for minors." Moreover, the prohibition against sales to minors does not bar parents who so desire from purchasing the magazines for their children.[7]

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[7] One commentator who argues that obscenity legislation might be constitutionally defective as an imposition of a single standard of public morality would give effect to the parental role and accept

The State also has an independent interest in the well-being of its youth. The New York Court of Appeals squarely bottomed its decision on that interest in *Bookcase, Inc.* v. *Broderick, supra,* at 75. Judge Fuld, now Chief Judge Fuld, also emphasized its significance in the earlier case of *People* v. *Kahan,* 15 N. Y. 2d 311, which had struck down the first version of § 484–h on grounds of vagueness. In his concurring opinion, 15 N. Y. 2d, at 312, he said:

> "While the supervision of children's reading may best be left to their parents, the knowledge that parental control or guidance cannot always be provided and society's transcendent interest in protecting the welfare of children justify reasonable regulation of the sale of material to them. It is, therefore, altogether fitting and proper for a state to include in a statute designed to regulate the sale of pornography to children special standards, broader than those embodied in legislation aimed at controlling dissemination of such material to adults."

In *Prince* v. *Massachusetts, supra,* at 165, this Court, too, recognized that the State has an interest "to protect the welfare of children" and to see that they are "safeguarded from abuses" which might prevent their "growth into free and independent well-developed men

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laws relating only to minors. Henkin, Morals and the Constitution: The Sin of Obscenity, 63 Col. L. Rev. 391, 413, n. 68 (1963):

"One must consider also how much difference it makes if laws are designed to protect only the morals of a child. While many of the constitutional arguments against morals legislation apply equally to legislation protecting the morals of children, one can well distinguish laws which do not impose a morality on children, but which support the right of parents to deal with the morals of their children as they see fit."

See also Elias, Sex Publications & Moral Corruption: The Supreme Court Dilemma, 9 W. & M. L. Rev. 302, 320–321 (1967).

and citizens." The only question remaining, therefore, is whether the New York Legislature might rationally conclude, as it has, that exposure to the materials proscribed by § 484–h constitutes such an "abuse."

Section 484–e of the law states a legislative finding that the material condemned by § 484–h is "a basic factor in impairing the ethical and moral development of our youth and a clear and present danger to the people of the state." It is very doubtful that this finding expresses an accepted scientific fact.[8] But obscenity is not protected expression and may be suppressed without a showing of the circumstances which lie behind the phrase "clear and present danger" in its application to protected speech. *Roth* v. *United States, supra,* at 486–487.[9] To sustain state power to exclude material defined as obscenity by § 484–h requires only that we be able to say that it was not irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors. In *Meyer* v. *Nebraska, supra,* at 400, we were able to say that children's knowledge of the German language "cannot reasonably be regarded as harmful." That cannot be said by us of minors' reading and seeing of sex material. To be sure, there is no lack of "studies" which purport to demonstrate that obscenity is or is not "a basic factor in impairing the ethical and moral development of . . . youth and a clear and present

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[8] Compare *Memoirs* v. *Massachusetts,* 383 U. S., at 424 (opinion of DOUGLAS, J.) with *id.,* at 441 (opinion of Clark, J.). See Kuh, *supra,* cc. 18–19; Gaylin, Book Review, 77 Yale L. J. 579, 591–595 (1968); Magrath, *supra,* at 52.

[9] Our conclusion in *Roth,* at 486–487, that the clear and present danger test was irrelevent to the determination of obscenity made it unnecessary in that case to consider the debate among the authorities whether exposure to pornography caused antisocial consequences. See also *Mishkin* v. *New York, supra.; Ginzburg* v. *United States, supra.; Memoirs* v. *Massachusetts, supra.*

danger to the people of the state." But the growing consensus of commentators is that "[w]hile these studies all agree that a causal link has not been demonstrated, they are equally agreed that a causal link has not been disproved either." [10] We do not demand of legislatures

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[10] Magrath, *supra*, at 52. See, *e. g.*, *id.*, at 49–56; Dibble, Obscenity: A State Quarantine to Protect Children, 39 So. Cal. L. Rev. 345 (1960); Wall, Obscenity and Youth: The Problem and a Possible Solution, 1 Crim. L. Bull. 28, 30 (1965); Note, 55 Cal. L. Rev. 926, 934 (1967); Note, 34 Ford. L. Rev. 692, 694 (1966). See also Paul & Schwartz, Federal Censorship: Obscenity in the Mail, 191–192; Blakey, 41 Notre Dame Law. 1055, 1060, n. 46 (1966); Green, Obscenity, Censorship and Juvenile Delinquency, 14 U. Toronto L. Rev. 229, 249 (1960); Lockhart & McClure, Literature, The Law of Obscenity, and the Constitution, 38 Minn. L. Rev. 295, 373–385 (1954); Note, 52 Ky. L. J. 429, 447 (1964). But despite the vigor of the ongoing controversy whether obscene material will perceptibly create a danger of anti-social conduct, or will probably induce its recipients to such conduct, a medical practitioner recently suggested that the possibility of harmful effects to youth cannot be dismissed as frivolous. Dr. Gaylin of the Columbia University Psychoanalytic Clinic, reporting on the views of some psychiatrists in 77 Yale L. J., at 592–593, said:

"It is in the period of growth [of youth] when these patterns of behavior are laid down, when environmental stimuli of all sorts must be integrated into a workable sense of self, when sensuality is being defined and fears elaborated, when pleasure confronts security and impulse encounters control—it is in this period, undramatically, and with time, that legalized pornography might conceivably be damaging."

Dr. Gaylin emphasizes that a child might not be as well prepared as an adult to make an intelligent choice as to the material he chooses to read:

"[P]sychiatrists . . . made a distinction between the reading of pornography, as unlikely to be per se harmful, and the permitting of the reading of pornography, which was conceived as potentially destructive. The child is protected in his reading of pornography by the knowledge that it is pornographic, *i. e.*, disapproved. It is outside of parental standards and not a part of his identification

a "scientifically certain criteria of legislation." *Noble State Bank* v. *Haskell*, 219 U. S. 104, 110. We therefore cannot say that § 484–h, in defining the obscenity of material on the basis of its appeal to minors under 17, has no rational relation to the objective of safeguarding such minors from harm.

II.

Appellant challenges subsections (f) and (g) of § 484–h as in any event void for vagueness. The attack on subsection (f) is that the definition of obscenity "harmful to minors" is so vague that an honest distributor of publications cannot know when he might be held to have violated § 484–h. But the New York Court of Appeals construed this definition to be "virtually identical to the Supreme Court's most recent statement of the elements of obscenity. (*Memoirs* v. *Massachusetts*, 383 U. S. 413, 418)," *Bookcase, Inc.* v. *Broderick*, *supra*, at 76. The definition therefore gives "men in acting adequate notice of what is prohibited" and does not offend the requirements of due process. *Roth* v. *United States*, *supra*, at 492; see also *Winters* v. *United States*, 333 U. S. 507, 520.

As is required by *Smith* v. *California*, 361 U. S. 147, § 484–h prohibits only those sales made "knowingly." The challenge to the *scienter* requirement of subsection (g) centers on the definition of "knowingly" insofar as it includes "reason to know" or "a belief or ground for belief which warrants further inspection or inquiry of both: (i) the character and content of any material described herein which is reasonably susceptible of examination by the defendant, and (ii) the age of the

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processes. To openly permit implies parental approval and even suggests seductive encouragement. If this is so of parental approval, it is equally so of societal approval—another potent influence on the developing ego." 77 Yale L. J., at 594.

minor, provided however, that an honest mistake shall constitute an excuse from liability hereunder if the defendant made a reasonable bona fide attempt to ascertain the true age of such minor."

As to (i), § 484-h was passed after the New York Court of Appeals decided *People* v. *Finkelstein*, 9 N. Y. 2d 342, which read the requirement of *scienter* into New York's general obscenity statute, § 1141 of the Penal Law. The constitutional requirement of *scienter*, in the sense of knowledge of the contents of material, rests on the necessity "to avoid the hazard of self-censorship of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity," *Mishkin* v. *New York*, *supra*, at 511. The Court of Appeals in *Finkelstein* interpreted § 1141 to require "the vital element of scienter" and defined that requirement in these terms: "A reading of the statute [§ 1141] as a whole clearly indicates that only those who are *in some manner aware of the character of the material* they attempt to distribute should be punished. It is not innocent but *calculated* purveyance of filth which is exorcised . . . ." 9 N. Y. 2d, at 344–345. (Emphasis supplied.) In *Mishkin* v. *New York*, *supra*, at 510–511, we held that a challenge to the validity of § 1141 founded on *Smith* v. *California*, *supra*, was foreclosed in light of this construction. When § 484-h was before the New York Legislature its attention was directed to *People* v. *Finkelstein*, as defining the nature of *scienter* required to sustain the statute. 1965 N. Y. S. Leg. Ann. 54–56. We may therefore infer that the reference in provision (i) to knowledge of "the *character* and content of any material described herein" incorporates the gloss given the term "character" in *People* v. *Finkelstein*. In that circumstance *Mishkin* requires rejection of appellant's challenge to provision (i) and makes it unnecessary for us to define further today "what sort of mental element

is requisite to a constitutionally permissible prosecution," *Smith* v. *California, supra,* at 154.

Appellant also attacks provision (ii) as impermissibly vague. This attack however is leveled only at the provision's proviso according the defendant a defense of "honest mistake" as to the age of the minor. Appellant argues that "the statute does not tell the bookseller what effort he must make before he can be excused." The argument is wholly without merit. The proviso states expressly that the defendant must be acquitted on the ground of "honest mistake" if the defendant proves that he made "a reasonable bona fide attempt to ascertain the true age of such minor." Cf. 1967 Penal Law § 235.22 (2), n. 1, *supra.*

Affirmed.

APPENDIX A.

New York Penal Law § 484–h as enacted by L. 1965, c. 327, provides:

§ 484–h. Exposing minors to harmful materials.

1. Definitions. As used in this section:

(a) "Minor" means any person under the age of seventeen years.

(b) "Nudity" means the showing of the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state.

(c) "Sexual conduct" means acts of masturbation, homosexuality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or, if such person be a female, breast.

(d) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(e) "Sado-masochistic abuse" means flagellation or torture by or upon a person clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

(f) "Harmful to minors" means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, when it:

(i) predominantly appeals to the prurient, shameful or morbid interest of minors, and

(ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and

(iii) is utterly without redeeming social importance for minors.

(g) "Knowingly" means having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of both:

(i) the character and content of any material described herein which is reasonably susceptible of examination by the defendant, and

(ii) the age of the minor, provided however, that an honest mistake shall constitute an excuse from liability hereunder if the defendant made a reasonable bona fide attempt to ascertain the true age of such minor.

2. It shall be unlawful for any person knowingly to sell or loan for monetary consideration to a minor:

(a) any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts nudity, sexual conduct or sado-masochistic abuse and which is harmful to minors, or

(b) any book, pamphlet, magazine, printed matter however reproduced, or sound recording which contains any matter enumerated in paragraph (a) of subdivision two hereof, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sado-masochistic abuse and which, taken as a whole, is harmful to minors.

3. It shall be unlawful for any person knowingly to exhibit for a monetary consideration to a minor or knowingly to sell to a minor an admission ticket or pass or knowingly to admit a minor for a monetary consideration to premises whereon there is exhibited, a motion picture, show or other presentation which, in whole or in part, depicts nudity, sexual conduct or sado-masochistic abuse and which is harmful to minors.

4. A violation of any provision hereof shall constitute a misdemeanor.

APPENDIX B.

State obscenity statutes having some provision referring to distribution to minors are:

Cal. Penal Code §§ 311–312 (West Supp. 1966); 3 Col. Rev. Stat. Ann. §§ 40–9–16 to 40–9–27 (1963); 9 Conn. Gen. Stat. Rev. §§ 53–243 to 53–245 (1963) (Supp. 1965); 7 Del. Code Ann., Tit. 11, §§ 435, 711–713 (1953); 22A Fla. Stat. Ann. §§ 847.011–847.06 (1965), 1967 Fla. Laws, h. 67–153; 10 Ga. Code Ann. §§ 26–6301 to 26–6309a (1953) (Supp. 1967); 2 Hawaii Rev. Laws § 267–8 (1955); 4 Idaho Code Ann. §§ 18–1506 to 18–1510 (Supp. 1967); 38 Ill. Ann. Stat., c. 38, §§ 11–20 to 11–21 (Smith-Hurd 1964) (Supp. 1967); Iowa Code Ann. §§ 725.4–725.12 (1950); 3 Ky. Rev. Stat. §§ 436.100–436.130, 436.540–436.580 (1962) (Supp. 1966); 9 La. Rev. Stat. §§ 91.11, 92, 106 (1950) (Supp. 1966); 9 Me. Rev. Stat. Ann., Tit. 17, §§ 2901–2905 (1964); 3 Md. Ann. Code, Art. 27, §§ 417–425 (1957) (Supp. 1967); Mass. Gen. Laws Ann., c. 272, §§ 28–33 (1959) (Supp. 1966); 25 Mich. Stat. Ann. §§ 28.575–28.579 (1954) (Supp. 1965); Mo. Ann. Stat. §§ 563.270–563.310 (1953) (Supp. 1967); 8 Mont. Rev. Codes Ann. §§ 94–3601 to 94–3606 (1949) (Supp. 1967); Neb. Rev. Stat. §§ 28–926.09 to 28–926.10 (Supp. 1965); 2 Nev. Rev. Stat. §§ 201.250, 207.180 (1957); 5 N. H. Rev. Stat. Ann. § 571–A (Supp. 1967); N. J. Stat. Ann. §§ 2A:115–1.1 to 2A:115–4 (Supp. 1967); 1 B N. C. Gen. Stat. § 14–189 (Supp. 1967); 2 N. D. Cent. Code §§ 12–21–07 to 12–21–09 (1960); Ohio Rev. Code Ann. §§ 2903.10–11, 2905.34–2905.39 (p. 1954) (Supp. 1966); Okla. Stat. Ann., Tit. 21, §§ 1021–1024, 1032–1040 (1958) (Supp. 1967); Pa. Stat. Ann., Tit. 18, §§ 3831–3833, 4524 (1963); 3 R. I. Gen. Laws Ann. §§ 11–31–1 to 11–31.1–10 (1956) (Supp. 1966); 4 S. C. Code Ann. §§ 16–414 to 16–421 (1962)

(Supp. 1966); Tex. Pen. Code Ann., Arts. 526, 527b (1952) (Supp. 1967); 2 Utah Code Ann. § 10–8–41 (1953), 8 Utah Code Ann. §§ 76–39–5, 76–39–17 (1953); 5 Vt. Stat. Ann., Tit. 13, §§ 2801–2805 (1958); 4 Va. Code Ann. §§ 18.1–227 to 18.1–236.3 (1960) (Supp. 1966); W. Va. Code Ann. § 61–8–11 (1966); Wyo. Stat. Ann. §§ 6–103, 7–148 (1957).

SUPREME COURT OF THE UNITED STATES

No. 47.—October Term, 1967.

Sam Ginsberg, Appellant, v. State of New York. | On Appeal From the Appellate Term of the Supreme Court of New York, Second Judicial Department.

[April 22, 1968.]

Mr. Justice Stewart, concurring in the result.

A doctrinaire, knee-jerk application of the First Amendment would, of course, dictate the nullification of this New York statute.[1] But that result is not required, I think, if we bear in mind what it is that the First Amendment protects.

The First Amendment guarantees liberty of human expression in order to preserve in our Nation what Mr. Justice Holmes called a "free trade in ideas."[2] To that end, the Constitution protects more than just a man's freedom to say or write or publish what he wants. It secures as well the liberty of each man to decide for himself what he will read and to what he will listen. The Constitution guarantees, in short, a society of free choice. Such a society presupposes the capacity of its members to choose.

When expression occurs in a setting where the capacity to make a choice is absent, government regulation of that expression may co-exist with and even implement First Amendment guarantees. So it was that this Court sustained a city ordinance prohibiting people from imposing their opinions on others "by way of sound trucks with

[1] The First Amendment is made applicable to the States through the Fourteenth Amendment. *Stromberg* v. *California*, 283 U. S. 359.

[2] *Abrams* v. *United States*, 250 U. S. 616, 630 (dissenting opinion).

loud and raucous noises on city streets." [3] And so it was that my Brothers BLACK and DOUGLAS thought that the First Amendment itself prohibits a person from foisting his uninvited views upon the members of a captive audience.[4]

I think a State may permissibly determine that, at least in some precisely delineated areas, a child [5]—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees. It is only upon such a premise, I should suppose, that a State may deprive children of other rights—the right to marry, for example, or the right to vote—deprivations that would be constitutionally intolerable for adults.[6]

I cannot hold that this state law, on its face,[7] violates the First and Fourteenth Amendments.

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[3] *Kovacs* v. *Cooper*, 336 U. S. 77, 86.

[4] *Public Utilities Comm'n* v. *Pollak*, 343 U. S. 451, 466 (dissenting opinion of MR. JUSTICE BLACK), 467 (dissenting opinion of MR. JUSTICE DOUGLAS).

[5] The appellant does not challenge New York's power to draw the line at age 17, and I intimate no view upon that question.

[6] Compare *Loving* v. *Virginia*, 388 U. S. 1, 12; *Carrington* v. *Rash*, 380 U. S. 89, 96.

[7] As the Court notes, the appellant makes no argument that the material in this case was not "harmful to minors" within the statutory definition, or that the statute was unconstitutionally applied.

SUPREME COURT OF THE UNITED STATES

No. 47.—October Term, 1967.

Sam Ginsberg, Appellant,
v.
State of New York.

On Appeal From the Appellate Term of the Supreme Court of New York, Second Judicial Department.

[April 22, 1968.]

Mr. Justice Douglas, with whom Mr. Justice Black concurs, dissenting.

While I would be willing to reverse the judgment on the basis of *Redrup* v. *New York*, 386 U. S. 767, for the reasons stated by my Brother Fortas, my objections strike deeper.

If we were in the field of substantive due process and seeking to measure the propriety of state law by the standards of the Fourteenth Amendment, I suppose there would be no difficulty under our decisions in sustaining this act. For there is a view held by many that the so-called "obscene" book or tract or magazine has a deleterious effect upon the young, although I seriously doubt the wisdom of trying by law to put the fresh, evanescent, natural blossoming of sex in the category of "sin."

That, however, was the view of our preceptor in this field, Anthony Comstock, who waged his war against "obscenity" from the year 1872 until his death in 1915. Some of his views are set forth in his book Traps for the Young, first published in 1883, excerpts from which I set out in Appendix I to this opinion.

The title of the book refers to "traps" created by Satan "for boys and girls especially." Comstock, of course, operated on the theory that every human has an "inborn tendency toward wrongdoing which is restrained mainly by fear of the final judgment." In his view any book which tended to remove that fear is a part of the "trap"

which Satan created. Hence, Comstock would have condemned a much wider range of literature than the present Court is apparently inclined to do.[1]

It was Comstock who was responsible for the Federal Anti-Obscenity Act of March 3, 1873. It was he also who was responsible for the New York Act which soon followed. He was responsible for the organization of the New York Society for the Suppression of Vice, which by its act of incorporation was granted one-half of the fines levied on people successfully prosecuted by the Society or its agents.

I would conclude from Comstock and his Traps for the Young and from other authorities that a legislature could not be said to be wholly irrational[2] (*Ferguson*

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[1] Two writers have explained Comstock as follows:

"He must have known that he could not wall out from his own mind all erotic fancies, and so he turned all the more fiercely upon the ribaldry of others." H. Broun & M. Leech, Anthony Comstock 27 (1927).

A notable forerunner of Comstock was an Englishman, Thomas Bowdler. Armed with a talent for discovering the "offensive," Bowdler expurgated Shakespeare's plays and Gibbon's History of the Decline and Fall of the Roman Empire. The result was "The Family Shakespeare," first published in 10 volumes in 1818, and a version of Gibbon's famous history "omitting everything of an immoral or irreligious nature, and incidentally rearranging the order of chapters to be in the strict chronology so dear to the obsessional heart." M. Wilson, The Obsessional Compromise, A Note on Thomas Bowdler (1965) (paper in Library of the American Psychiatric Association, Washington, D. C.):

[2] "The effectiveness of more subtle forms of censorship as an instrument of social control can be very great. They are effective over a wider field of behavior than is propaganda in that they affect convivial and 'purely personal' behavior.

"The principle is that certain verbal formulae shall not be stated, in print or in conversation; from this the restriction extends to the discussion of certain topics. A perhaps quite rationally formulated taboo is imposed; it becomes a quasi-religious factor for the members of the group who subscribe to it. If they are a majority,

v. *Skrupa*, 372 U. S. 726; and see *Williamson* v. *Lee Optical Co.*, 348 U. S. 483; *Daniel* v. *Family Ins. Co.*, 336 U. S. 220; *Olson* v. *Nebraska*, 313 U. S. 236) if it decided that sale of "obscene" material to the young should be banned.[3]

The problem under the First Amendment, however, has always seemed to me to be quite different. For its mandate (originally applicable only to the Federal Government but now applicable to the States as well by reason of the Fourteenth Amendment) is directed to any law "abridging the freedom of speech, or of the press." I appreciate that there are those who think that "obscenity" is impliedly excluded; but I have indicated on prior occasions why I have been unable to reach that conclusion.[4] See *Ginzburg* v. *United States*, 383 U. S.

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and the taboo does not affect some master-symbol of an influential minority, it is apt to become quite universal in its effect. A great number of taboos—to expressive and to other acts—are embodied in the *mores* of any people. The sanction behind each taboo largely determines its durability—in the sense of resistance opposed to the development of contradictory *counter-mores*, or of simple disintegration from failure to give returns in personal security. If it is to succeed for a long time, there must be recurrent reaffirmations of the taboo in connection with the sanctioning power.

"The occasional circulation of stories about a breach of the taboo and the evil consequences that flowed from this to the offender *and* to the public cause (the sanctioning power) well serves this purpose. Censorship of this sort has the color of voluntary acceptance of a ritualistic avoidance, in behalf of oneself and the higher power. A violation, after the primitive patterns to which we have all been exposed, strikes at both the sinner and his god." The William Alanson White Psychiatric Foundation Memorandum: Propaganda & Censorship, 3 Psychiatry 628, 631 (1940).

[3] And see W. Gaylin, Book Review: The Prickley Problems of Pornography, 77 Yale L. J. 579, 594.

[4] My Brother HARLAN says that no other Justice of this Court, past or present, has ever "stated his acceptance" of the view that "obscenity" is within the protection of the First and Fourteenth Amendments. *Ante*, at 2. That observation, however, should not

463, 482 (dissenting opinion); *Jacobellis* v. *Ohio*, 378 U. S. 184, 196 (concurring opinion of MR. JUSTICE BLACK); *Roth* v. *United States*, 354 U. S. 476, 508

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be understood as demonstrating that no other members of this Court, since its first Term in 1790, have adhered to the view of my Brother BLACK and myself. For the issue "whether obscenity is utterance within the area of protected speech and press" was only "squarely presented" to this Court for the first time in 1957. *Roth* v. *United States*, 354 U. S. 476, 481. This is indeed understandable, for the state legislatures have borne the main burden in enacting laws dealing with "obscenity"; and the strictures of the First Amendment were not applied to them through the Fourteenth until comparatively late in our history. In *Gitlow* v. *New York*, 268 U. S. 652, decided in 1925, the Court assumed that the right of free speech was among the freedoms protected against state infringement by the Due Process Clause of the Fourteenth Amendment. See also *Whitney* v. *California*, 274 U. S. 357, 371, 373; *Fiske* v. *Kansas*, 274 U. S. 380. In 1931, *Stromberg* v. *California*, 283 U. S. 359, held that the right of free speech was guaranteed in full measure by the Fourteenth Amendment. But even after these events "obscenity" cases were not inundating this Court; and even as late as 1948, the Court could say that many state obscenity statutes had "lain dormant for decades." *Winters* v. *New York*, 333 U. S. 507, 511. In several cases prior to *Roth*, the Court reviewed convictions under federal statutes forbidding the sending of "obscene" materials through the mails. But in none of these cases was the question squarely presented or decided whether "obscenity" was protected speech under the First Amendment; rather, the issues were limited to matters of statutory construction, or questions of procedure, such as the sufficiency of the indictment. See *United States* v. *Chase*, 135 U. S. 255; *Grimm* v. *United States*, 156 U. S. 604; *Rosen* v. *United States*, 161 U. S. 29; *Swearingen* v. *United States*, 161 U. S. 446; *Andrews* v. *United States*, 162 U. S. 420; *Price* v. *United States*, 165 U. S. 311; *Dunlop* v. *United States*, 165 U. S. 486; *Bartell* v. *United States*, 227 U. S. 427; *Dysart* v. *United States*, 272 U. S. 655; *United States* v. *Limehouse*, 285 U. S. 424. Thus, *Roth* v. *United States*, *supra*, which involved both a challenge to 18 U. S. C. §1461 (punishing the mailing of "obscene" material) and, in a consolidated case (*Alberts* v. *California*), an attack upon Cal. Pen. Code § 311 (prohibiting, *inter alia*, the keeping for sale or advertising of "obscene" material), was the first case authoritatively to measure federal and state obscenity

(dissenting opinion). And the corollary of that view, as I expressed it in *Public Utilities Comm'n* v. *Pollak*, 343 U. S. 451, 467, 468 (dissenting opinions), is that Big Brother can no more say what a person shall listen to or read than he can say what shall be published.

This is not to say that the Court and Anthony Comstock are wrong in concluding that the kind of literature New York condemns does harm. As a matter of fact, the notion of censorship is founded on the belief that speech and press sometimes do harm and therefore can be regulated. I once visited a foreign nation where the regime of censorship was so strict that all I could find in the bookstalls were tracts on religion and tracts on mathematics. Today the Court determines the constitutionality of New York's law regulating the sale of literature to children on the basis of the reasonableness of the law in light of the welfare of the child. If the problem of state and federal regulation of "obscenity" is in the field of substantive due process, I see no reason to limit the legislatures to protecting children alone. The "juvenile delinquents" I have known are mostly over 50 years of age. If rationality is the measure of the validity of this law, then I can see how modern Anthony Comstocks could make out a case for "protecting" many groups in our society, not merely children.

While I find the literature and movies which come to us for clearance exceedingly dull and boring, I understand how some can and do become very excited and

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statutes against the prohibitions of the First and Fourteenth Amendments. I cannot speak for those who preceded us in time; but neither can I interpret occasional utterances suggesting that "obscenity" was not protected by the First Amendment as considered expressions of the views of any particular Justices of the Court. See, *e. g.*, *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571–572; *Beauharnais* v. *Illinois*, 343 U. S. 250, 266. The most that can be said, then, is that no other members of this Court since 1957 have adhered to the view of my Brother BLACK and myself.

alarmed and think that something should be done to stop the flow. It is one thing for parents [5] and the religious organizations to be active and involved. It is quite a different matter for the State to become implicated as a censor. As I read the First Amendment, it was designed to keep the State and the hands of all state officials off the printing presses of America and off the distribution systems for all printed literature. Anthony Comstock wanted it the other way; he indeed put the police and prosecutor in the middle of this publishing business.

I think it would require a constitutional amendment to achieve that result. If there were a constitutional amendment, perhaps the people of the country would come up with some national board of censorship. Censors are of course propelled by their own neuroses.[6] That is why a universally accepted definition of obscenity is impossible. Any definition is indeed highly subjective,

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[5] See Appendix II to this opinion.

[6] Reverend Fr. Juan de Castaniza of the 16th century explained those who denounced obscenity as expressing only their own feelings. In his view they had too much reason to suspect themselves of being "obscene," since "vicious men are always prone to think others like themselves." T. Schroeder, A Challenge to Sex Censors 44–45 (1938).

"Obscenity, like witchcraft . . . consists, broadly speaking, of a [delusional] projection of certain emotions (which, as the very word implies, emanate from within) to external things and an endowment of such things (or in the case of witchcraft, of such persons) with the moral qualities corresponding to these inward states . . . .

"Thus persons responsible for the persistent attempts to suppress the dissemination of popular knowledge concerning sex matters betray themselves unwittingly as the bearers of the very impulses they would so ostentatiously help others to avoid. Such persons should know through their own experience that ignorance of a subject does not insure immunity against the evils of which it treats, nor does the propitiatory act of noisy public disapproval of certain evils signify innocence or personal purity." Van Teslaar, Book Review, 8 Jour. Abnormal Psychology 282, 286 (1913).

turning on the neurosis of the censor. Those who have a deep-seated, subconscious conflict may well become either great crusaders against a particular kind of literature or avid customers of it.[7] That, of course, is the danger of letting any group of citizens be the judges of what other people, young or old, should read. Those would be issues to be canvassed and debated in case of a constitutional amendment creating a regime of censorship in the country. And if the people, in their wisdom, launched us on that course, it would be a considered choice.

Today this Court sits as the Nation's board of censors. With all respect, I do not know of any group in the country less qualified first, to know what obscenity is when they see it, and second, to have any considered judgment as to what the deleterious or beneficial impact of a particular publication may have on minds either young or old.

I would await a constitutional amendment that authorized the modern Anthony Comstocks to censor literature before publishers, authors, or distributors can be fined or jailed for what they print or sell.

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[7] See Appendix III to this opinion.

APPENDIX I.

COMSTOCK, TRAPS FOR THE YOUNG 20–22 (1883).

And it came to pass that as Satan went to and fro upon the earth, watching his traps and rejoicing over his numerous victims, he found room for improvement in some of his schemes. The daily press did not meet all his requirements. The *weekly* illustrated papers of crime would do for young men and sports, for brothels, gin-mills, and thieves' resorts, but were found to be so gross, so libidinous, so monstrous, that every decent person spurned them. They were excluded from the home on sight. They were too high-priced for children, and too cumbersome to be conveniently hid from the parent's eye or carried in the boy's pocket. So he resolved to make another trap for boys and girls especially.

He also resolved to make the most of these vile illustrated weekly papers, by lining the news-stands and shop-windows along the pathway of the children from home to school and church, so that they could not go to and from these places of instruction without giving him opportunity to defile their pure minds by flaunting these atrocities before their eyes.

And Satan rejoiced greatly that professing Christians were silent and apparently acquiesced in his plans. He found that our most refined men and women went freely to trade with persons who displayed these traps for sale; that few, if any, had moral courage to enter a protest against this public display of indecencies, and scarcely one in all the land had the boldness to say to the dealer in filth, "I will not give you one cent of my patronage so long as you sell these devil-traps to ruin the young." And he was proud of professing Christians and respectable citizens on this account, and caused honorable men-

tion to be made of them in general order to his imps, because of the quiet and orderly assistance thus rendered him.

Satan stirred up certain of his willing tools on earth by the promise of a few paltry dollars to improve greatly on the death-dealing quality of the weekly death-traps, and forthwith came a series of new snares of fascinating construction, small and tempting in price, and baited with high-sounding names. These sure-ruin traps comprise a large variety of half-dime novels, five and ten cent story papers, and low-priced pamphlets for boys and girls.

This class includes the silly, insipid tale, the coarse, slangy story in the dialect of the barroom, the blood-and-thunder romance of border life, and the exaggerated details of crimes, real and imaginary. Some have highly colored sensational reports of real crimes, while others, and by far the larger number, deal with most improbable creations of fiction. The unreal far outstrips the real. Crimes are gilded, and lawlessness is painted to resemble valor, making a bid for bandits, brigands, murderers, thieves, and criminals in general. Who would go to the State prison, the gambling saloon, or the brothel to find a suitable companion for the child? Yet a more insidious foe is selected when these stories are allowed to become associates for the child's mind and to shape and direct the thoughts.

The finest fruits of civilization are consumed by these vermin. Nay, these products of corrupt minds are the eggs from which all kinds of villainies are hatched. Put the entire batch of these stories together, and I challenge the publishers and vendors to show a single instance where any boy or girl has been elevated in morals, or where any noble or refined instinct has been developed by them.

The leading character in many, if not in the vast majority of these stories, is some boy or girl who possesses usually extraordinary beauty of countenance, the most superb clothing, abundant wealth, the strength of a giant, the agility of a squirrel, the cunning of a fox, the brazen effrontery of the most daring villain, and who is utterly destitute of any regard for the laws of God or man. Such a one is foremost among desperadoes, the companion and beau-ideal of maidens, and the high favorite of some rich person, who by his patronage and indorsement lifts the young villain into lofty positions in society, and provides liberally of his wealth to secure him immunity for his crimes. These stories link the pure maiden with the most foul and loathsome criminals. Many of them favor violation of marriage laws and cheapen female virtue.

APPENDIX II.

A Special to The Washington Post

by

Austin C. Wehrwein

White Bear Lake, Minn., March 2.—Faced with the threat of a law suit, the school board in this community of 12,000 north of St. Paul is reviewing its mandatory sex education courses, but officials expressed fear that they couldn't please everybody.

Mothers threatened to picket and keep their children home when sex education films are scheduled. Mrs. Robert Murphy, the mother of five who led the protests, charged that the elementary school "took the privacy out of marriage."

"Now," she said, "our kids know what a shut bedroom door means. The program is taking their childhood away. The third graders went in to see a movie on birth and came out adults."

She said second-grade girls have taken to walking around with "apples and oranges under their blouses." Her seventh-grade son was given a study sheet on menstruation, she said, demanding "why should a seventh-grade boy have to know about menstruation?"

Mrs. Murphy, who fears the program will lead to experimentation, said that it was "pagan" and argued that even animals don't teach their young those things "before they're ready."

"One boy in our block told his mother, 'Guess what, next week our teacher's gonna tell us how daddy fertilized you," reported Mrs. Martin Capeder. "They don't need to know all that."

But Norman Jensen, principal of Lincoln School, said that the program, which runs from kindergarten through

the 12th grade, was approved by the school district's PTA council, the White Bear Lake Ministerial Association and the district school board. It was based, he said, on the polls that showed 80 per cent of the children got no home sex education, and the curriculum was designed to be "matter-of-fact."

The protesting parents insisted they had no objection to sex education as such, but some said girls should not get it until age 12, and boys only at age 15—"or when they start shaving."

(In nearby St. Paul Park, 71 parents have formed a group called "Concerned Parents Against Sex Education" and are planning legal action to prevent sex education from kindergarten through seventh grade. They have also asked equal time with the PTAs of eight schools in the district "to discuss topics such as masturbation, contraceptives, unqualified instructors, religious belief, morality and attitudes.")

The White Bear protesters have presented the school board with a list of terms and definitions deemed objectionable. Designed for the seventh grade, it included vagina, clitoris, erection, intercourse and copulation. A film, called "Fertilization and Birth" depicts a woman giving birth. It has been made optional after being shown to all classes.

Mrs. Ginny McKay, a president of one of the local PTAs defended the program, saying "Sex is a natural and beautiful thing. We (the PTA) realized that the parents had to get around to where the kids have been for a long time."

But Mrs. Murphy predicted this result: "Instead of 15 [*sic*] and 15-year-old pregnant girls, they'll have 12 and 13-year-old pregnant girls."

APPENDIX III.

(A). SCHROEDER, OBSCENE LITERATURE AND CONSTITUTIONAL LAW 277–278 (1911).

It thus appears that the only unifying element generalized in the word "obscene," (that is, the only thing common to every conception of obscenity and indecency), is subjective, is an affiliated emotion of disapproval. This emotion under varying circumstances of temperament and education in different persons, and in the same person in different stages of development, is aroused by entirely different stimuli, and by fear of the judgment of others, and so has become associated with an infinite variety of ever-changing objectives, with not even one common characteristic in objective nature; that is, in literature or art.

Since few men have identical experiences, and fewer still evolve to an agreement in their conceptional and emotional associations, it must follow that practically none have the same standards for judging the "obscene," even when their conclusions agree. The word "obscene," like such words as delicate, ugly, lovable, hateful, etc., is an abstraction not based upon a reasoned, nor sense-perceived, likeness between objectives, but the selection or classification under it is made, on the basis of similarity in the emotions aroused, by an infinite variety of images; and every classification thus made, in turn, depends in each person upon his fears, his hopes, his prior experience, suggestions, education, and the degree of neuro-sexual or psycho-sexual health. Because it is a matter wholly of emotions, it has come to be that "men think they know because they feel, and are firmly convinced because strongly agitated."

This, then, is a demonstration that obscenity exists only in the minds and emotions of those who believe in it, and is not a quality of a book or picture. Since, then, the general conception "obscene" is devoid of every objective element of unification; and since the subjective element, the associated emotion, is indefinable from its very nature, and inconstant as to the character of the stimulus capable of arousing it, and variable and immeasurable as to its relative degrees of intensity, it follows that the "obscene" is incapable of accurate definition or a general test adequate to secure uniformity of result, in its application by every person, to each book of doubtful "purity."

Being so essentially and inextricably involved with human emotions that no man can frame such a definition of the word "obscene," either in terms of the qualities of a book, or such that, *by it alone*, any judgment whatever is possible, much less is it possible that by any such alleged "test" every other man must reach the same conclusion about the obscenity of every conceivable book. Therefore, the so-called judicial "tests" of obscenity are not standards of judgment, but, on the contrary, by every such "test" the rule of decision is itself uncertain, and in terms invokes the varying experiences of the testors within the foggy realm of problematical speculation about psychic tendencies, without the help of which the "test" itself is meaningless and useless. It follows that to each person the "test," of criminality, which should be a general standard of judgment, unavoidably becomes a personal and particular standard, differing in all persons according to those varying experiences which they read into the judicial "test." It is this which makes uncertain, and, therefore, all the more objectionable, all the present laws against obscenity. Later it will be shown that this uncertainty in the criteria of guilt renders these laws unconstitutional.

(B). KALLEN, THE ETHICAL ASPECTS OF CENSORSHIP, V SOCIAL MEANING OF LEGAL CONCEPTS 50–51 (1953).

To this authoritarian's will, difference is the same thing as inferiority, wickedness and corruption; he can apprehend it only as a devotion to error and a commitment to sin. He can acknowledge it only if he attributes to it moral turpitude and intellectual vice. Above all, difference must be for him, by its simple existence, an aggession against the good, the true, the beautiful and the right. His imperative is to destroy it; if he cannot destroy it, to contain it; if he cannot contain it, to hunt it down, cut it off and shut it out.

Certain schools of psychology suggest that this aggression is neither simple nor wholly aggression. They suggest that it expresses a compulsive need to bring to open contemplation the secret parts of the censor's psychosomatic personality, and a not less potent need to keep the secret and not suffer the shamefaced dishonor of their naked exposures. The censor's activities, in that they call for a constant public preoccupation with such secret parts, free his psyche from the penalties of such concern while transvaluing at the same time his pursuit and inspection of the obscene, the indecent, the pornographic, the blasphemous and the otherwise shameful into an honorable defense of the public morals. The censor, by purporting, quite unconscious of his actual dynamic, to protect the young from corruption, frees his consciousness to dwell upon corruption without shame or dishonor. Thus Anthony Comstock could say with overt sincerity: "When the genius of the arts produces obscene, lewd and lascivious ideas, the deadly effect upon the young is just as perceptible as when the same ideas are represented by gross experience in prose and poetry. . . . If through

the eye and ear the sensuous book, picture or story is allowed to enter, the thoughts will be corrupted, the conscience seared, so such things reproduced by fancy in the thoughts awaken forces for evil which will explode with irresistible force carrying to destruction every human safeguard to virtue and honor." Did not evil Bernard Shaw, who gave the English language the word *comstockery*, declare himself, in his preface to *The Shewing-Up of Blanco Posnet*, "a specialist in immoral, heretical plays . . . to force the public to reconsider its morals"? So the brave Comstock passionately explored and fought the outer expressions of the inner forces of evil and thus saved virtue and honor from destruction.

But could this observation of his be made, save on the basis of introspection and not the scientific study of others? For such a study would reveal, for each single instance of which it was true, hundreds of thousands of others of which it was false. Like the correlation of misfortune with the sixth day of the week or the number 13, this basis comstockery signalizes a fear-projected superstition. It is an externalization of anxiety and fear, not a fact objectively studied and appraised. And the anxiety and fear are reaction-formations of the censor's inner self.

Of course, this is an incomplete description of the motivation and logic of censorship. In the great censorial establishments of the tradition, these more or less unconscious drives are usually items of a syndrome whose dominants are either greed for pelf, power, and prestige, reinforced by anxiety that they might be lost, or anxiety that they might be lost reinforced by insatiable demands for more.

Authoritarian societies usually insure these goods by means of a prescriptive creed and code for which their rulers claim supernatural origins and supernatural sanctions. The enforcement of the prescriptions is not en-

trusted to a censor alone. The ultimate police-power is held by the central hierarchy, and the censorship of the arts is only one department of the thought-policing.

(C). CRAWFORD, LITERATURE AND THE PSYCHOPATHIC, 10 PSYCHO-ANALYTIC REVIEW 445–446 (1923).

Objection, then, to modern works on the ground that they are, in the words of the objectors, "immoral," is made principally on the basis of an actual desire to keep sexual psychopathies intact, or to keep the general scheme of repressions, which inevitably involves psychopathic conditions, intact. The activities of persons, professionally or otherwise definitely concerned with censorship, furnish proof, evident enough to the student of such matters, that they themselves are highly abnormal. It is safe to say that *every censorship has a psychopath back of it.*

Carried to a legal end, censorship would inevitably destroy all literary art. Every sexual act is an instinctive feeling out for an understanding of life. Literary art, like every other type of creative effort, is a form of sublimation. It is a more conscious seeking for the same understanding that the common man instinctively seeks. The literary artist, having attained understanding, communicates that understanding to his readers. That understanding, whether of sexual or other matters, is certain to come into conflict with popular beliefs, fears, and taboos, because these are, for the most part, based on error . . . the presence of an opinion concerning which one thinks it would be unprofitable, immoral, or unwise to inquire is, of itself, strong evidence that that opinion is non-rational. Most of the more deep-seated convictions of the human race belong to this category. Anyone who is seeking for understanding is certain to encounter this non-rational attitude.

The act of sublimation on the part of the writer necessarily involves an act of sublimation on the part of the reader. The typical psychopathic patient and the typical public have alike a deep-rooted unconscious aversion to sublimation. Inferiority and other complexes enter in, to make the individual feel that acts of sublimation would destroy his comfortable, though illusory, sense of superiority. Again, there is the realization on the part of the mass of people that they are unable to sublimate as the artist does, and to admit his power and right to do so involves destruction of the specious sense of superiority to him. It is these two forms of aversion to sublimation which account for a considerable part of public objection to the arts. The common man and his leader, the psychopathic reformer, are aiming unconsciously at leveling humanity to a plane of pathological mediocrity.

To the student of abnormal psychology the legend, popular literature, and literature revelatory of actual life, are all significant. In the legend he finds race taboos; in the popular literature of the day he discovers this reinforced by the mass of contemporary and local taboos; in literature that aims to be realistically revelatory of life he finds material for study such as he can hardly obtain from any group of patients. The frankness which he seeks in vain from the persons with whom he comes into personal contact, he can find in literature. It is a field in which advances may be made comparable to the advances of actual scientific research.

Moreover, the student of abnormal psychology will commend realistic, revelatory literature not only to his patients, who are suffering from specific psychopathic difficulties, but to the public generally. He will realize that it is one of the most important factors in the development of human freedom. No one is less free than primitive man. The farther we can get from the attitude

of the legend and its slightly more civilized successor, popular literature, the nearer we shall be to a significant way of life.

(D). RINALDO, PSYCHOANALYSIS OF THE "REFORMER" 56–60 (1921).

The other aspect of the humanist movement is a very sour and disgruntled puritanism which seems at first glance to protest and contradict every step in the libidinous development. As a matter of fact it is just as much an hysterical outburst as the most sensuous flesh masses of Rubens, or the sinuous squirming lines of Louis XV decoration. Both are reactions to the same morbid past experience.

The Puritan like the sensualist rebels at the very beginning against the restraint of celibacy. Unfortunately, however, he finds himself unable to satisfy the libido in either normal gratification or healthy converted activities. His condition is as much one of super-excitement as that of the libertine. Unable to find satisfaction in other ways, from which for one reason or another he is inhibited, he develops a morbid irritation, contradicting, breaking, prohibiting, and thwarting the manifestations of the very exciting causes.

Not being able to produce beautiful things he mars them, smashing stained glass windows, destroying sculptures, cutting down May-poles, forbidding dances, clipping the hair, covering the body with hideous misshapen garments and silencing laughter and song. He cannot build so he must destroy. He cannot create so he hinders creation. He is a sort of social abortionist and like an abortionist only comes into his own when there is an illegitimate brat to be torn from the womb. He cries against sin, but it is the pleasure of sin rather than the sin he fights. It is the enjoyment he is denied that he hates.

From no age or clime or condition is he absent; but never is he a dominant and deciding factor in society till that society has passed the bounds of sanity. Those who wait the midwife never call in the abortionist, nor does he ever cure the real sickness of his age. That he does survive abnormal periods to put his impress on the repressions of later days is due to the peculiar economy of his behavior. The libertine destroys himself, devouring his substance in self-satisfaction. The reformer devours others, being somewhat in the nature of a tax on vice, living by the very hysteria that destroys his homologous opposite.

In our own day we have reached another of those critical periods strikingly similar in its psychological symptoms and reactions, at least, to decadent Rome. We have the same development of extravagant religious cults, Spiritism, Dowieism, "The Purple Mother," all eagerly seized upon, filling the world with clamor and frenzy; the same mad seeking for pleasure, the same breaking and scattering of forms, the same orgy of gluttony and extravagence, the same crude emotionalism in art, letter and the theater, the same deformed and inverted sexual life:

Homosexualism may not be openly admitted, but the "sissy" and his red necktie are a familiar and easily understood property of popular jest and pantomime. It is all a mad jazz jumble of hysterical incongruities, dog dinners, monkey marriages, cubism, birth control, feminism, free-love, verse libre, and moving pictures. Through it all runs the strident note of puritanism. As one grows so does the other. Neither seems to precede or follow.

It would be a rash man indeed who would attempt to give later beginnings to the reform movements than to the license they seem so strongly to contradict. Significant indeed is the fact that their very license is the strongest appeal of the reformer. Every movie must

preach a sermon and have a proper ending, but the attempted rape is as seldom missing as the telephone; and it is this that thrills and is expected to thrill.

The same sexual paradox we saw in the eunuch priests and harlot priestesses of Isis we see in the vice-crusading, vice-pandering reformers. Back of it all lies a morbid sexual condition, which is as much behind the anti-alcoholism of the prohibitionist, as behind the cropped head of his puritan father, and as much behind the birth-control, vice-crusading virgins as behind their more amiable sisters of Aphrodite.

Interpreted then in the light of their history, libertinism and reformism cannot be differentiated as cause and effect, action and reaction, but must be associated as a two-fold manifestation of the same thing, an hysterical condition. They differ in externals, only insofar as one operates in license and the other in repression, but both have the same genesis and their development is simultaneous.

(E). LASSWELL, PSYCHOPATHOLOGY AND POLITICS 94-96 (1930).

Another significant private motive, whose organization dates from early family days, but whose influence was prominent in adult behavior, was A's struggle to maintain his sexual repressions. ["A" is an unidentified, non-fictional person whose life history was studied by the author.] He erected his very elaborate personal prohibitions into generalized prohibitions for all society, and just as he laid down the law against brother-hatred, he condemned "irregular" sexuality and gambling and drinking, its associated indulgencies. He was driven to protect himself by so modifying the environment that his sexual impulses were least often aroused, but it is significant that he granted partial indulgence to his repressed sexuality by engaging in various activities closely

associated with sexual operations. Thus his sermons against vice enabled him to let his mind dwell upon rich fantasies of seduction. His crusading ventures brought him to houses of ill fame, where partly clad women were discoverable in the back rooms. These activities were rationalized by arguing that it was up to him as a leader of the moral forces of the community to remove temptation from the path of youth. At no time did he make an objective inquiry into the many factors in society which increase or diminish prostitution. His motives were of such an order that he was prevented from self-discipline by prolonged inspection of social experience.

That A was never able to abolish his sexuality is sufficiently evident in his night dreams and day dreams. In spite of his efforts to "fight" these manifestations of his "antisocial impulses," they continued to appear. Among the direct and important consequences which they produced was a sense of sin, not only a sense of sexual sin, but a growing conviction of hypocrisy. His "battle" against "evil" impulses was only partially successful, and this produced a profound feeling of insecurity.

This self-punishing strain of insecurity might be alleviated, he found, by publicly reaffirming the creed of repression, and by distracting attention to other matters. A's rapid movements, dogmatic assertions, and diversified activities were means of escape from this gnawing sense of incapacity to cope with his own desires and to master himself. Uncertain of his power to control himself, he was very busy about controlling others, and engaged in endless committee sessions, personal conferences, and public meetings for this purpose. He always managed to submerge himself in a buzzing life of ceaseless activity; he could never stand privacy and solitude, since it drove him to a sense of futility; and he couldn't undertake prolonged and laborious study, since his feeling of inse-

curity demanded daily evidence of his importance in the world.

A's sexual drives continued to manifest themselves, and to challenge his resistances. He was continually alarmed by the luring fear that he might be impotent. Although he proposed marriage to two girls when he was a theology student, it is significant that he chose girls from his immediate entourage, and effected an almost instantaneous recovery from his disappointments. This warrants the inference that he was considerably relieved to postpone the test of his potency, and this inference is strengthened by the long years during which he cheerfully acquiesced in the postponement of his marriage to the woman who finally became his wife. He lived with people who valued sexual potency, particularly in its conventional and biological demonstration in marriage and children, and his unmarried state was the object of good-natured comment. His pastoral duties required him to "make calls" on the sisters of the church, and in spite of the cheer which he was sometimes able to bring to the bedridden, there was the faint whisper of a doubt that this was really a man's job. And though preaching was a socially respectable occupation, there was something of the ridiculous in the fact that one who had experienced very little of life should pass for a privileged censor of all mankind.

SUPREME COURT OF THE UNITED STATES

No. 47.—October Term, 1967.

Sam Ginsberg, Appellant, v. State of New York. } On Appeal From the Appellate Term of the Supreme Court of New York, Second Judicial Department.

[April 22, 1968.]

Mr. Justice Fortas, dissenting.

This is a criminal prosecution. Sam Ginsberg and his wife operate a luncheonette at which magazines are offered for sale. A 16-year-old boy was enlisted by his mother to go to the luncheonette and buy some "girlie" magazines so that Ginsberg could be prosecuted. He went there, picked two magazines from a display case, paid for them, and walked out. The offense of the Ginsbergs was duly reported to the authorities. The power of the State of New York was invoked. Ginsberg was prosecuted and convicted. The court imposed only a suspended sentence. But as the majority here points out, under New York law this conviction may mean that Ginsberg will lose the license necessary to operate his luncheonette.

The two magazines that the 16-year-old boy selected are vulgar "girlie" periodicals. However tasteless and tawdry they may be, we have ruled (as the Court acknowledges) that magazines indistinguishable from them in content and offensiveness are not "obscene" within the constitutional standards heretofore applied. See, *e. g., Gent* v. *Arkansas*, 386 U. S. 767 (1967). These rulings have been in cases involving adults.

The Court avoids facing the problem whether the magazines in the present case are "obscene" when viewed by a 16-year-old boy, although not "obscene" when

viewed by someone 17 years of age or older. It says that Ginsberg's lawyer did not choose to challenge the conviction on the ground that the magazines are not "obscene." He chose only to attack the statute on its face. Therefore, the Court reasons, we need not look at the magazines and determine whether they may be excluded from the ambit of the First Amendment as "obscene" for purposes of this case. But this Court has made strong and comprehensive statements about its duty in First Amendment cases—statements with which I agree. See, *e. g.*, *Jacobellis* v. *Ohio*, 378 U. S. 184, 187–190 (1964).*

In my judgment, the Court cannot properly avoid its fundamental duty to define "obscenity" for purposes of censorship of material sold to youths, merely because of counsel's position. By so doing the Court avoids the essence of the problem; for if the State's power to censor freed from the prohibitions of the First Amendment depends upon obscenity, and if obscenity turns on the specific content of the publication, how can we sustain the conviction here without deciding whether the particular magazines in question are obscene?

The Court certainly cannot mean that the States and cities and counties and villages have unlimited power to withhold anything and everything that is written or pictorial from younger people. But it here justifies the conviction of Sam Ginsberg because the impact of the Constitution, it says, is variable, and what is not obscene for an ~~adult~~ may be obscene for a child. This it calls

* "[W]e reaffirm the principle that, in 'obscenity' cases as in all others involving rights derived from the First Amendment guarantees of free expression, this Court cannot avoid making an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected." 378 U. S., at 190. See *Cox* v. *Louisiana*, 379 U. S. 536, 545, n. 8 (1965).

"variable obscenity." I do not disagree with this, but I insist that to assess the principle—certainly to apply it—the Court must define it. We must know the extent to which literature or pictures may be less offensive than *Roth* requires in order to be "obscene" for purposes of a statute confined to youth. See *Roth* v. *United States*, 354 U. S. 476 (1957).

I agree that the State in the exercise of its police power—even in the First Amendment domain—may make proper and careful differentiation between adults and children. But I do not agree that this power may be used on an arbitrary, free-wheeling basis. This is not a case where, on any standard enunciated by the Court, the magazines are obscene, nor one where the seller is at fault. Petitioner is being prosecuted for the sale of magazines which he had a right under the decisions of this Court to offer for sale, and he is being prosecuted without proof of "fault"—without even a claim that he deliberately, calculatedly sought to induce children to buy "obscene" material. Bookselling should not be a hazardous profession.

The conviction of Ginsberg on the present facts is a serious invasion of freedom. To sustain the conviction without inquiry as to whether the material is "obscene" and without any evidence of pushing or pandering, in face of this Court's asserted solicitude for First Amendment values, is to give the State a role in the rearing of children which is contrary to our traditions and to our conception of family responsibility. Cf. *In re Gault*, 387 U. S. 1 (1967). It begs the question to present this undefined, unlimited censorship as an aid to parents in the rearing of their children. This decision does not merely protect children from activities which all sensible parents would condemn. Rather, its undefined and unlimited approval of state censorship in this area denies to children free access to books and works of art to which

many parents may wish their children to have uninhibited access. For denial of access to these magazines, without any standard or definition of their allegedly distinguishing characteristics, is also denial of access to great works of art and literature.

If this statute were confined to the punishment of pushers or panderers of vulgar literature I would not be so concerned by the Court's failure to circumscribe state power by defining its limits in terms of the meaning of "obscenity" in this field. The State's police power may, within very broad limits, protect the parents and their children from public aggression of panderers and pushers. This is defensible on the theory that they cannot protect themselves from such assaults. But it does not follow that the State may convict a passive luncheonette operator of a crime because a 16-year-old boy maliciously and designedly picks up and pays for two girlie magazine which are presumably *not* obscene.

I would therefore reverse the conviction on the basis of *Redrup* v. *New York*, 386 U. S. 767 (1967) and *Ginzburg* v. *United States*, 383 U. S. 463 (1966).